Supreme Court, U. S.
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No. 79-1952

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CALIFORNIA MEDICAL ASSOCIATION, et al.,
Appellants,

vs.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

Whether jurisdiction exists under 2 U.S.C. §437h, including whether the requirements of article III are satisfied and:

1. Whether the pendency of an enforcement action under 2 U.S.C. § 437g, against some of the appellants,* bars jurisdiction under § 437h.

2. Whether 2 U.S.C. § 437h(a) limits the expedited review procedures to questions involving the "facial constitutionality" of the Federal Election Campaign Act.

3. Whether the Court has appellate jurisdiction under 2 U.S.C. § 437h(b) although the court of appeals rendered its decision on questions certified under § 437h(a) while sitting en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, rather than § 437h(a).

Whether the court of appeals correctly answered the certified questions** in the negative, thereby sustaining

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*The parties include appellants, the California Medical Association ("CMA"), a not-for-profit unincorporated association; the California Medical Political Action Committee ("CALPAC"), a political committee sponsored by CMA; and Sidney E. Foster, M.D., and E. Kash Rose, M.D., registered voters and members of CMA and CALPAC. Appellees are the Federal Election Commission ("FEC"); its members at the time this action was commenced, Joan D. Aikens, Robert O. Tiernan, Thomas E. Harris, John McGarry, Vernon E. Thompson, Max Friedersdorf; and its ex-officio members, J. Stanley Kimmit and Edmund L. Henshaw, Jr. Frank R. Reiche replaced Vernon E. Thompson as a member of the FEC after this action was commenced.

**The certified questions are set forth verbatim in the Jurisdictional Statement ("J.S.") at A-82, and in the opinion by the court of appeals, J.S. at A-2, n.1; *Federal Election Campaign Financing Guide* (*CCH*), ¶ 9127 (1980).

the limit on contributions to a political committee established by 2 U.S.C. § 441(a)(1)(C) or:

1. Whether 2 U.S.C. § 441a(a)(1)(C) violates the first amendment on its face, or when applied to limit in-kind contributions of administrative support by an unincorporated association to its political committee.

2. Whether 2 U.S.C. § 441a(a)(1)(C), § 441b(b)(2)(C), § 431(8)(B)(vi), and § 431(9)(B)(v)*** violate the fifth amendment to the extent they limit contributions of administrative support by an unincorporated association to its political committee, when corporations and labor organizations may contribute unlimited amounts of such support to their political committees which operate as separate segregated funds.

***Formerly § 431(e)(5)(F) and § 431(f)(4)(H), *see* n.1, *infra.*

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On Appeal From the United States Court of Appeals For the Ninth Circuit En Banc

BRIEF OF APPELLANTS

OPINIONS AND ORDERS BELOW

The district court's order certifying constitutional questions to the Ninth Circuit is printed in the Jurisdictional Statement ("J.S.") at A-82. The opinion of the court of appeals, *California Medical Ass'n, et al. v. Federal Election Commission, et al.*, No. 79-4426 (9th Cir. May 23, 1980), is printed in the Jurisdictional Statement at A-1. It is reported in *Federal Election Campaign Financing Guide* (CCH) ¶ 9127 (1980). When this brief was printed the opinion had not been published in the Federal Reporter.[1]

[1]Citations to the opinions by the Court of Appeals will be made to the Jurisdictional Statement ("J.S.") and the *Federal Election Campaign Financing Guide* ("CCH").

JURISDICTION

Jurisdiction is invoked under 2 U.S.C. § 437h. This action was commenced May 7, 1979. Constitutional questions were certified to the Ninth Circuit for hearing en banc pursuant to § 437h(a) by an order filed July 9, 1979. The court of appeals answered those questions in the negative in an opinion filed May 23, 1980. Notice of Appeal was filed June 3, 1980. The appeal was docketed in this Court on June 12, 1980. This Court has jurisdiction pursuant to § 437h(b), which provides:

> *Appeal to Supreme Court; time for appeal.* Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

STATUTES INVOLVED

This case concerns the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, as amended ("the Act"), and specifically § 431(8)(B)(vi), § 431(9)(B)(v), § 441a(a)(1)(C) and § 441b(b)(2)(C) as well as the first and fifth amendments to the Constitution.[2] The text of the pertinent provisions is set forth in the Jurisdiction Statement at 3-5, in Appendix B to the Jurisdictional Statement at A-74 - A-81, and in Appendix A to the Federal Election Com-

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[2]P.L. 92-225, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, P.L. 93-443, 88 Stat. 1263, and the 1976 Amendments, P.L. 94-283, 90 Stat. 475. All citations are to Title 2 of the United States Code, §§ 431-455, except as otherwise noted. After this action was filed the Act was amended by the Federal Election Campaign Act Amendments of 1979, P.L. 96-187, 93 Stat. 1339, effective January 8, 1980. Former §§ 431(e)(5)(F) and 431(f)(4)(H) were renumbered as §§ 431(8)(B)(vi) and 431(9)(B)(v) by the 1979 Amendments.

mission's ("FEC" or "the Commission") Motion to Dismiss the Appeal at 10a-14a.

The jurisdictional provisions of the Act, §§ 437g and 437h, are set out in Appendix A to the FEC's Motion at 1a-9a.[3]

STATEMENT OF THE CASE

On May 7, 1979, appellants filed a complaint for declaratory and injunctive relief, naming the FEC and its members as defendants. (Joint Appendix ("J.A.")4.) Appellants challenged the constitutionality of the provisions of the Act which limit the amount CMA may contribute to CALPAC, and which CALPAC may receive from CMA, to $5,000 per calendar year. In particular, appellants challenged § 441a(a)(1)(C) to the extent it limits support furnished by CMA to CALPAC solely for the purpose of establishing, administering or soliciting contributions to CALPAC. Appellants alleged the offending provisions of the Act violate the first and fifth amendments to the Constitution, and sought declaratory relief and to enjoin enforcement of these provisions against CMA and CALPAC.[4] At a hearing on June 29, 1979 the district court granted appellants' motion to certify constitutional questions to the court of appeals for hearing en banc and denied the FEC's motion to dismiss. An order was entered to that effect July 9, 1979. (J.S. A-82.) The Ninth Circuit directed the parties to address the constitutionality of the provision in 2 U.S.C. § 437h(a) which requires the court of appeals to hear this matter en banc. (J.A. 30.) Oral argument was heard on October 11, 1979. On May 23, 1980, an

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[3] § 437h(a) is also set out at n.9, *infra*.

[4] As to CALPAC appellants sought to enjoin enforcement of § 441a(f), which provides "No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section . . ."

opinion was filed which answered the certified questions in the negative and denied appellants' claims on the merits. (J.S. A-1.) Concurring and dissenting opinions were filed by Judges Choy and Wallace. (J.S. A-29, A-31.) Appellants appealed pursuant to § 437h(b). In an order dated October 6, 1980, the question of jurisdiction was postponed until the hearing on the merits. (J.A. 32.)

CMA is a membership organization which is organized and operates as a not-for-profit, unincorporated association. It established and administers a political committee, known as CALPAC. CMA provides CALPAC with administrative support in the form of goods and services.[5] (J.S. A-82 - A-83; J.A. 23.) CMA is the "connected organization" for CALPAC, as defined by former 11 C.F.R. § 100.15.[6] (J.A. 7.) CALPAC is registered as a "political committee"[7] with the FEC. It operates as a nonpartisan political action committee and receives voluntary contributions intended for use in state and federal campaigns. CALPAC makes contributions from these funds to candidates for federal office and qualifies as a multicandidate

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[5]The reference to "administrative support" as used in this brief refers to expenditures for the "establishment, administration, and solicitation of contributions to" a political committee. § 441b(b)(2)(C). According to 11 C.F.R. § 114.1(b)(1980) this includes the cost of "office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in running a separate segregated fund . . ."

[6]See § 431(7) (1980) and 11 C.F.R. § 100.6 (1980). FEC regulations were revised subsequent to the commencement of this action, 45 Fed. Reg. 15094 (March 7, 1980).

[7]§ 431(4) (1980) defines a political committee to include "any committee . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . ."

[8]Defined in § 441a(a)(4) as "a political committee which has been registered under section 433 for a period of not less than 6 months, which has received contributions from more than 50

political committee under the Act.[8] (J.S. A-83; J.A. 23-24.) Sidney E. Foster, M.D., and E. Kash Rose, M.D., are eligible to vote for the office of President of the United States, and are members of both CMA and CALPAC. (J.S. A-83.) Dr. Foster is CALPAC's treasurer and Dr. Rose has served as an officer of both CMA and CALPAC. (J.A. 25.)

Section 441a(a) (1) (C) limits contributions, defined by § 431(8) (1980), to a political committee to $5,000 per calendar year. Section 441a(a) (1) (C) and § 441a(f) place a $5,000 calendar year limit on contributions a political committee may receive from any person. These provisions limit the contributions CMA may donate to CALPAC, and which CALPAC may receive from CMA, to $5,000 per calendar year. (J.S. A-83; J.A. 26-28.)

Despite the limits imposed by § 441a(a) (1) (C), under § 441b(b) (2) (C), § 431(8) (B) (vi), and § 431(9) (B) (v), corporations and labor organizations may make unlimited contributions of administrative support, as defined in § 441b(b) (2) (C), to their respective political committees which operate as separate segregated funds. These provisions also allow political committees sponsored by a corporation or labor organization which operate as separate segregated funds to receive unlimited contributions of administrative support from the sponsoring corporation or labor organization. (J.S. A-83-A-84; J.A. 26-28.)

Section 441b(b) (2) (C) contains an exemption for support by a "membership organization" for its political committee. As interpreted by the FEC, the exemption applies only to incorporated membership organizations. (J.A. 27.) CMA's contributions to CALPAC of administrative sup-

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persons, and, . . . has made contributions to 5 or more candidates for Federal office." A multicandidate committee may contribute up to $5,000 per candidate per election, § 441a(a)(2)(A). Other contributors are limited to contributions of $1,000 by § 441a(a)(1)(A).

port are therefore limited to $5,000 in value per calendar year solely because CMA is unincorporated. (J.A. 27.)

In October 1978 CMA and CALPAC were advised the FEC had "reason to believe" they had violated the Act because CMA's in-kind contributions to CALPAC had exceeded $5,000 per calendar year contrary to § 441a(a) (1) (C) and § 441a(f). In November 1978 CMA and CALPAC were advised that the Commission had determined there was "reasonable cause" to believe violations had been committed. In April 1979 the Commission determined there was "probable cause" to believe violations had occurred. On May 23, 1979, the FEC filed an enforcement action in the District Court for the Northern District of California alleging, *inter alia,* CMA and CALPAC had violated the Act because of CMA's in-kind support of CALPAC. (J.S. A-84 - A-85; J.A. 28-29.) That action, *Federal Election Commission v. California Medical Ass'n, et al.*, No. 79 1197 WHO, was decided adversely to CMA and CALPAC on June 21, 1980. A copy of the opinion is printed in Appendix F to this brief. CALPAC is continuing to operate as a political committee and is registered with the Commission. (J.A. 23-24.)

SUMMARY OF ARGUMENT

I

Jurisdiction is conferred by § 437h. The mandate in § 437h that the court of appeals sit en banc is not directly at issue, since the court of appeals sat en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. The mandate is constitutional given the Congress' power to determine the jurisdiction of the lower federal courts. CMA and CALPAC have standing, and the case or controversy requirements of article III have been fulfilled, given the pendency of an enforcement action against CMA and CALPAC involving the same provisions at issue here.

Appellants Foster and Rose have statutory standing pursuant to § 437h(a) and have a sufficient personal stake in this matter to satisfy the requirements of article III. The pendency of an enforcement action brought under § 437g does not preempt jurisdiction, particularly since the court of appeals has rendered a decision which has been followed by the district court in the enforcement action. Jurisdiction under § 437h is not limited to the "facial constitutionality" of the Act. Even as limited, jurisdiction exists because the consideration of this matter involves a facial analysis and the disposition by the court of appeals applies generally to any unincorporated association and its political committee. For jurisdictional purposes, it is irrelevant that the court of appeals sat en banc pursuant to Rule 35. Jurisdiction of this appeal is premised on § 437h(b) and a decision by the court of appeals on a matter properly certified pursuant to § 437h(a), not on the rationale used by the court of appeals to sit en banc.

II

The $5,000 calendar year limit on contributions to a political committee established by § 441a(a)(1)(C) violates appellants' first amendment rights, particularly to the extent it limits contributions by an unincorporated association to its political committee made for the purpose of establishing, administering or soliciting contributions to the committee. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and the cases relied on therein reaffirm the protection the first amendment affords the expenditure of money for political activity. An unincorporated association and its political committee are protected by the first amendment when they engage in effective political action. Limits on contributions to a political committee interfere directly with the exercise of first amendment rights and decrease the funds available for political purposes.

The majority below erred in failing to apply a strict standard of scrutiny to the limits on contributions to political committees and by equating contributions to political committees with contributions made to or on behalf of candidates. Contributions to political committees are functionally different from contributions to candidates. Contributions to a committee may fund expenditures and other political activity by the committee, in addition to political contributions. When correctly analyzed, contributions to political committees are more properly compared to independent expenditures. For the same reasons limits on expenditures were invalidated in *Buckley*, a limit on contributions to political committees cannot be sustained.

The need to avoid the actuality or appearance of any quid pro quo arrangements between contributors and candidates justifies limits on contributions to candidates. *Buckley v. Valeo*, 424 U.S. at 26-27. The same rationale cannot be extended to contributions to a political committee. Contributions to a committee do not directly involve the contributor-candidate nexus. Contributions by a committee to a candidate are subject to separate limits. A limit on contributions to committees provides insubstantial protection against corruption, or the appearance of corruption. This is particularly so with respect to contributions of administrative support.

The limit on contributions to political committees is imprecise and overboard. In addition to whatever incidental protection may be provided against corruption, the limit diminishes funds available for political activity. This reduces effective political action and the level of candidate support, and results in a decrease in the quantity of political discussion.

Less drastic legislative means are available to control corruption or the appearance of corruption. The Act con-

tains a variety of anti-evasion provisions which directly and narrowly address potential avoidance of the limits on contributions to candidates. The contribution limits and anti-evasion provisions of § 441a, and the reporting requirements of § 434, provide a comprehensive regulatory scheme and furnish less drastic means to control corruption or the appearance of corruption, rendering § 441a(a)(1)(C) an unnecessary burden on first amendment rights.

III

Section 441b(b)(2)(C) and its definitional counterparts in § 431 provide corporations and labor organizations with an exemption from the limits on contributions to a political committee for contributions made for the purpose of establishing, administering or soliciting contributions to a political committee. These provisions discriminate against unincorporated associations and their political committees in violation of the equal protection component of the due process clause of the fifth amendment.

The limit on administrative supports by an unincorporated association for its political committee is not part of a balanced regulatory scheme. Although corporations and labor organizations may not make direct political contributions or expenditures, § 441b allows corporations or labor organizations several viable avenues to engage in political activity in addition to providing unlimited administrative support for their political committees. Corporations and labor organizations may engage in effective solicitations for their political committees and otherwise influence the political process by communicating with their shareholders and their families and executive or administrative personnel, or their members and families, respectively, without limit. These provisions allow vigorous political activity involving those persons most likely to respond. The concurrent limit on administrative support an unincorporated association may furnish its political committee is not a rational statutory classification.

The limitation on administrative support by an unincorporated association for its political committee interferes with the exercise of first amendment rights. The statutory classification fails to satisfy a compelling governmental interest or the exacting scrutiny required where fundamental rights are infringed.

ARGUMENT

I

JURISDICTION EXISTS UNDER 2 U.S.C. § 437h

A. The Constitutionality of the Requirement the Court Of Appeals Sit En Banc

Given the decision in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam) the validity of § 437h must be assumed except with respect to the requirement the court of appeals sit en banc, an issue not before the Court. The question whether Congress can require the court of appeals to sit en banc pursuant to § 437h(a) is not directly at issue here.[9] The majority avoided the issue, as did the District of Columbia Circuit in *Buckley v. Valeo,* 519 F.2d 821, 902, n.2 (D.C. Cir. 1975) (en banc) (per curiam), *aff'd in part,* 424 U.S. 1 (1976) (per curiam), by sitting en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure, *CMA v. FEC,* J.S. at A-3, A-26, CCH at 50,960, 50,997. Judge

[9] § 437h provides in part:

> (a) *Actions, including declaratory judgments, for construction of constitutional questions; eligible plaintiffs; certification of such questions to courts of appeals sitting en banc.* The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

Wallace's dissent questions the process of invoking § 437h (a) to confer jurisdiction but relying on Rule 35 to sit en banc. *Id.* at A-34, CCH at 50,999. Because of the inference that § 437h required the court to convene en banc, even though it elected to decide the case under Rule 35, appellants will discuss the validity of the en banc requirement.

En banc proceedings are extraordinary and generally conducted only when a case presents an issue of sufficient concern to enough litigants who may be in similar circumstances. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960). In enacting § 437h, Congress implicitly decided that special circumstances exist when a constitutional question is raised with respect to the Act or that such questions are of sufficient concern so as to require authoritative resolution, thus justifying en banc proceedings. Congress has power to create inferior federal courts and to specify their jurisdiction within the confines of article III, *e.g., Palmore v. United States,* 411 U.S. 389, 400-401 (1973), and to direct the Supreme Court to establish rules of practice and procedure, *Sibbach v. Wilson & Co.,* 312 U.S. 1, 9-10 (1941). It follows that Congress has authority to mandate en banc hearings in those cases it deems appropriate. The mandate that the court of appeals sit en banc when ruling on certified questions is constitutional. *CMA v. FEC*, J.S. at A-34, A-41, CCH at 51,002 (Wallace, J., concurring and dissenting) (jurisdiction limited to "facial" constitutionality only.)

Concerns regarding the separation of powers do not support a conclusion that § 437h has disrupted the workings of the coordinate parts of government. The standard of workability, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring), and questions of "disruption of the balance between the branches . . . ," *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977), would only be relevant with

a showing that courts have become overburdened with cases certified under § 437h. The present action is the first case certified under § 437h in the Ninth Circuit since the statute was enacted in 1974.[10] To date § 437h has rarely been used and hardly poses a threat based on the volume of litigation to the balance between the courts and Congress. Even if the en banc requirement is invalid, it may be severed in the absence of a showing that Congress would not have enacted § 437h but for the en banc requirement. *Buckley v. Valeo,* 424 U.S. at 108-109.

B. The Requirements of Article III Are Satisfied

The standing requirements of article III are satisfied as CMA and CALPAC are directly affected by the offending provisions of the Act, and because they are defendants in a separate action regarding alleged violations of the same provisions at issue here. When this action was filed CMA and CALPAC were closer to actual enforcement proceedings than plaintiffs in *Babbitt v. United Farm Workers National Union,* 442 U.S. 289 (1979). Given the enforcement proceeding, even more than the plaintiffs in *Buckley,* appellants here have a personal stake in the outcome neces-

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[10]Nationwide there appear to be only a handful of certified cases: one in the First Circuit, *John B. Anderson v. FEC,* No. 80-1664 (1st Cir. 1980) (remanded for fact-finding); two in the D.C. Circuit, *Buckley v. Valeo,* and *Clark v. Valeo,* 559 F.2d 642 (D.C. Cir. 1977) (en banc), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977); one in the Seventh Circuit, *Bread Political Action Committee v. FEC,* 591 F.2d 29 (7th Cir. 1979) (en banc hearing ordered); two in the Second Circuit, *FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (questions certified *sua sponte* after they had been raised as a defense, and *Republican Nat. Committee v. FEC,* 616 F.2d 1 (2d Cir. 1979), *aff'd,* 100 S.Ct. 1639 (1980); and one in the Fifth Circuit, *FEC v. Lance,* No. 79-185g (5th Cir. May 5, 1980) (certified *sua sponte*).

sary to meet the requirements of article III. *Buckley v. Valeo*, 424 U.S. at 12, n. 10.[11]

Bread PAC v. FEC, 591 F.2d 29 (7th Cir. 1979) addressed the issue whether a political committee could invoke the expedited review procedures of § 437h. The court concluded that even though trade associations and their political committees were not included in the plaintiffs listed in the first sentence of § 437h(a), they nevertheless had standing to challenge the constitutionality of the Act. *Contra, Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980). The court found § 437h(a) was intended to assure the purpose of "comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act." 591 F.2d at 33. The court recognized:

> . . . The direction to certify all constitutional questions indicates again that Congress intended the expedited review procedures to *apply broadly* to challenges to the Act.

591 F.2d at 31 (Emphasis added). The opinion relies on the acknowledgment in *Buckley* of a sufficient interest by at least some of the plaintiffs so that a "real and substantial controversy admitting of specific relief" was presented and the comment that an organization is permitted to assert personal rights of its membership. 424 U.S. at 12, n.10. *See Let's Help Florida v. Smathers*, 453 F.Supp. 1003 (N.D.

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[11]Plaintiffs in *Buckley* included a candidate for the presidency, a U.S. Senator, a potential contributor, several political parties, a political committee, and various interest groups. When the action was filed, one day after the effective date of the 1974 Amendments, none of the parties was a defendant in an enforcement action. *See generally* Clagett & Bolton, *Buckley v. Valeo, Its Aftermath, and Its Prospects: The Constitutionality of Governmental Restraints on Political Campaign Financing*, 29 Vand. L. Rev. 1327, 1328, n.2 (1976).

Fla. 1978), *aff'd sub nom., Let's Help Florida v. McCrary,* 621 F.2d 195 (5th Cir. 1980).

Appellants Foster and Rose clearly fall within the plaintiffs listed in the statute. By including a reference to "any individual eligible to vote in any election for the office of president" Congress determined voters should have access to a forum to test the constitutionality of the Act. Beyond their interest as individual voters, Foster and Rose also are members of CMA and CALPAC, and have more than a generalized interest in the case. Section 441a(a)(1)(C) limits their contributions to political committees and their rights of association with other members of CMA and CALPAC for the purpose of engaging in effective political action. They have the requisite personal stake in this case to satisfy article III because of the impact the offending provisions of the Act have on their first amendment rights. *CMA v. FEC,* J.S. at A-45, A-46; CCH at 51,003 (Wallace, J., concurring and dissenting).

In *Flast v. Cohen,* 392 U.S. 83 (1968) the Court held plaintiff taxpayers had standing to challenge the expenditure of federal funds as violating the establishment of religion clause of the first amendment because of the general impact on the public, rather than as a result of the utilization of funds contributed by those particular taxpayers. Where the first amendment is involved, standing should be conferred more liberally. *See Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). The decision in *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972) is instructive. There the Court gave vitality to the Civil Rights Act with a broad construction of standing, emphasizing the adversary context of the dispute and the absence of "abstract question-raising problems." 409 U.S. at 211.

Given the enforcement action, the case or controversy requirement is satisfied. This case is not a situation where a litigant "seeks to employ a federal court as a forum in which to air his general grievances about the conduct of government or the allocation of power in the federal system." *Flast v. Cohen,* 392 U.S. at 106. It is easily distinguished from *Gifford v. Congress,* 452 F.Supp. 802, 806 (E.D. Cal. 1978), where the court dismissed the complaint because "the extraordinary procedure set up in § 437h should not be utilized when the constitutional claim is frivolous." *Clark v. Valeo,* and *Martin Tractor Co. v. FEC,* are inapposite as those cases turned on the absence of a controversy ripe for decision. *Mott v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9134 (D.C.D.C. 1980), also involved ripeness considerations and the district court's conclusion that the constitutional issues had previously been decided.

C. Pendency of an Enforcement Action Under § 437g Does Not Bar Jurisdiction Under § 437h

Nothing in the statutory scheme mandates a finding that the pendency of an enforcement action forecloses certification under § 437h. To the contrary, § 437g and § 437h are separate parts of the statutory scheme and serve distinct purposes. As noted in *Bread PAC v. FEC,* 591 F.2d at 32-33, under § 437g(a)(10)(1980)[12] an enforcement action must be advanced on the docket ahead of all other cases, *except those filed under § 437h.* Thus, while § 437g provides an alternative method to obtain judicial review for some litigants, it does not foreclose a proceeding under § 437h. Instead, constitutional questions are entitled to "receive the even more expedited review" required by § 437g(a)(10) and unlike an enforcement action may be taken to the Supreme Court by direct appeal. *Id.* at 33.

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[12]Formerly § 437g(a)(11).

Section 437h was designed to allow for the expeditious review, including ultimate review by the Supreme Court, of constitutional challenges to the Act which satisfy the requirements of article III. A premium is placed on expeditious review. *Clark v. Valeo,* 559 F.2d at 661 (Lowenthal, J., concurring). The en banc requirement, the grant of standing in § 437h(a), and the command that such cases be expedited demonstrate Congress' intent that challenges be resolved promptly and authoritatively. This rationale would be disrupted if expedited review could be stalled or barred altogether by an enforcement proceeding. If an action under § 437g superseded an action under § 437h, it would be possible for the Commission to wait until a § 437h case had been filed and questions certified, then file an enforcement action thereby depriving litigants of the special expedited review procedures. This would encourage forum-shopping and dilatory tactics by the FEC, and does not conform with the goal of speedy review of constitutional questions. *See Bread PAC v. FEC,* 591 F.2d at 33; *Clark v. Valeo,* 559 F.2d at 661 (Lowenthal, J., concurring).

Deferring to an enforcement proceeding leads to a circular result. In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee ("CLITRIM"),* 616 F.2d 45 (2d Cir. 1980) (en banc), the district court relied on § 437h to certify *sua sponte* constitutional questions raised in defense. This leads to the anomaly of a proceeding under § 437h being superseded by a proceeding under § 437g, only to see the special review provisions of § 437h ultimately invoked in the enforcement action. If fact-finding is undertaken in a § 437h proceeding, *e.g., Buckley v. Valeo,* 424 U.S. at 9-10; *Clark v. Valeo,* 559 F.2d at 645, n.2, and an enforcement action is pending, fact-finding could conceivably be consolidated without interfering with the mandate of § 437h.

Preemption by the enforcement action makes no sense in this proceeding. The district court has adherred to the Ninth Circuit's opinion on the constitutional questions. Nothing would be served to now defer ruling on the merits in favor of further proceedings in the enforcement proceeding which would in any event be a foregone conclusion insofar as constitutional questions are concerned given the Ninth Circuit's opinion. Thus, even if as a general rule it is determined that an enforcement proceeding preempts an action brought under § 437h, the application of that rule here serves no purpose.

D. This Appeal Presents Questions Regarding the "Facial" Constitutionality of the Act. Jurisdiction Exists Even if § 437h is Narrowly Construed to Apply Only to Such Questions

The notion § 437h limits jurisdiction to challenges of the "facial constitutionality" of the Act was rejected by seven members of the court of appeals. *CMA v. FEC,* J.S. at A-25, CCH at 50,996; *contra,* J.S. at A-34-A-41, CCH at 50,999-51,001 (Wallace, J., concurring and dissenting). The question of whether a particular challenge to the Act is directed solely to the facial provisions of the Act is imprecise and an improper standard to apply. *Id.* The appropriate test is whether or not the case satisfies the basic requirements of article III. *See Buckley v. Valeo,* 424 U.S. at 11-12; *Bread PAC v. FEC,* 591 F.2d at 33-35.

It is basic that a court first construe a statute to avoid addressing constitutional questions whenever possible. *Crowell v. Benson,* 285 U.S. 22, 62 (1932). In *Buckley,* the Court construed and interpreted the expenditure ceiling in 18 U.S.C. § 608(e)(1), 424 U.S. at 40-45. Construction or interpretation of a statute does not foreclose jurisdiction under § 437h. *CMA v. FEC,* J.S. at A-48, n.15, CCH at 51,004 (Wallace, J., concurring and dissenting). If the court

needs additional facts it can remand to allow fact-finding by the district court. *Buckley v. Valeo*, 424 U.S. at 7-10; *Clark v. Valeo*, 559 F.2d at 661; *Bread PAC v. FEC*, 591 F.2d at 36. Thus, even if the scope of § 437h is limited to the facial validity of the Act, construction of the relevant statutes and fact-finding to frame the issues are appropriate and do not of themselves defeat jurisdiction.

Appellants have challenged the offending provisions of the Act on their face. The majority's analysis was limited to the Act on its face, and the opinion applies equally to any unincorporated association that sponsors a political committee. The opinion does not turn on facts peculiar to CMA or CALPAC. As pointed out by Judge Choy, both concurring and dissenting opinions apply equally to all unincorporated associations without reliance on specific factual circumstances. *CMA v. FEC*, J.S. at A-29, CCH at 50,997 (Choy, J., concurring and dissenting). The same is true of the majority opinion. Even if the expedited en banc procedure mandated by § 437h is limited to questions of the facial constitutionality of the Act, the certified questions have been addressed in those terms and jurisdiction exists.

E. It Is Irrelevant the Court of Appeals Sat En Banc Pursuant to Rule 35 Rather Than § 437h

This appeal is brought pursuant to section 437h(b), which provides in pertinent part:

> . . . any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States . . .

Once the court of appeals has decided a matter properly certified under subsection (a) the right of appeal to this Court lies. Nothing in § 437h(b) requires the court of appeals to sit en banc pursuant to § 437h(a) as a prerequisite

for this Court's jurisdiction. Clearly this was not required in *Buckley* where the court of appeals sat en banc pursuant to Rule 35. *Buckley v. Valeo,* 519 F.2d at 902, n.2. Jurisdiction there was premised on certification by the district court to the court of appeals pursuant to § 437h(a), and a decision by the court of appeals on the certified questions. This Court's appellate jurisdiction under § 437h(b) should not be confused with the jurisdiction of the court of appeals to render a decision on questions certified under § 437h(a), and the concurrent mandate of § 437h(a) that the courts of appeals sit en banc.

Here, the court of appeals invoked Rule 35 to hear the matter en banc.[13] Taking its cue from the Second Circuit, the majority avoided what might be "delicate questions," noting the importance of the case warranted an en banc hearing pursuant to Rule 35. *CMA v. FEC*, J.S. at A-26, CCH at 50,997, *citing Buckley v. Valeo*, 519 F.2d at 902, n.2. Jurisdiction does not depend on why the court of appeals sat en banc, but only on the fact that a decision was entered on a matter properly certified pursuant to § 437h(a). Since the court of appeals rendered a decision on a matter properly certified pursuant to §437h(a), jurisdiction under §437h(b) exists.

II

THE LIMIT IMPOSED BY § 441a(a)(1)(C) ON CONTRIBUTIONS BY AN UNINCORPORATED ASSOCIATION TO ITS POLITICAL COMMITTEE VIOLATES THE FIRST AMENDMENT

Appellants challenge the $5,000 calendar year limit on contributions to a political committee imposed by § 441a (a)(1)(C) for the narrow purpose of obtaining a decision

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[13]The court of appeals had requested the parties to address the constitutionality of the requirement that it sit en banc. Order by Chief Judge Browning filed August 1, 1979, J.A. 30.

that allows an unincorporated association to provide unlimited support for its political committee where that support is solely for the purpose of establishing, administering, or soliciting contributions to the committee. While arguments made in support of this challenge may sustain the invalidation of §441a(a)(1)(C) in its entirety, appellants' concerns are more narrowly circumscribed. Thus, appellants will primarily address the question of limits on "administrative support" for a political committee.

By providing administrative support for CALPAC, CMA allows CALPAC to use all of the voluntary contributions which CALPAC receives for the purpose of making contributions to candidates for public office or for other political activity, including independent expenditures. This mechanism is typical of the approach by political action committees and their sponsors.[14] Costs inherent in the establishment and administration of CALPAC, and in the solicitation of contributions to CALPAC, are absorbed by CMA. This subsidization permits CALPAC to use all funds received as voluntary contributions to make contributions to candidates for public office or engage in other political activity. A limit on CMA's administrative support of CALPAC directly affects the funds available to make contributions to candidates or engage in other political activity, since CALPAC is obliged to pay costs of administration and solicitation directly from the voluntary contributions it receives.

The limits established by §441a(a)(1)(C) must be evaluated in light of the Court's landmark decision on campaign finance regulation, *Buckley v. Valeo,* 424 U.S. 1

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[14]*See Pipefitters Local 562 v. United States,* 407 U.S. 385, 393, 401-432 (1972) (political action by union); FEC Advisory Opinion 1975-23 (Sun Oil), 40 Fed. Reg. 56584, CCH ¶5151, (political action by a corporation).

(1976) (per curiam). Limits on contribution and expenditures operate in the area of "the most fundamental First Amendment activities." 424 U.S. at 14. The protection afforded by the first amendment extends to freedom of association as well as the exercise of political speech and public debate. 424 U.S. at 15, 25, 58-59, *citing, e.g., NAACP v. Alabama*, 357 U.S. 449, 460 (1958) and *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). Analysis of the nature of contributions to political committees in light of *Buckley* shows that the $5,000 calendar year limit on contributions to a political committee is unconstitutional, particularly when applied to limit administrative support an unincorporated association may provide its political committee.

A. Limits on Contributions to a Political Committee Infringe First Amendment Rights and Cannot Be Sustained By the Rationale That Justifies Limits on Contributions to Candidates

In *Buckley v. Valeo* limits on expenditures by candidates in federal elections, and independent expenditures by others, were held unconstitutional, 424 U.S. at 39-51, but limits on contributions to candidates were sustained because of the need to prevent corruption or the appearance of corruption, 424 U.S. at 26-28. Congress responded with the 1976 Amendments.[15] Limits on contributions now appear in § 441a. A multicandidate political committee may contribute up to $5,000 per candidate per election under § 441a(a) (2) (A). Other "persons" are limited by § 441a (a) (1) (A) to contributions of $1,000 to any candidate, or a candidate's authorized committee, per election. Section 441a includes provisions designed to prevent circumven-

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[15]The 1976 Amendments were the direct result of the sweeping ruling in *Buckley*. *See, e.g., Clagett and Bolton, supra*, n.11; Senate Report No. 94-677, printed at 2 U.S. Code Cong. & Adm. News, 929-946 (1976).

tion of the limits on contributions.[16] Also, for the first time a limit was placed on contributions to political committees, defined in § 431(4) (1980) as any group of persons which receives contributions or makes expenditures during a calendar year in excess of $1,000. Under § 441a(a)(1)(C) no person may contribute more than $5,000 per year to a political committee.

No operative distinction is made in the Act between contributions given to a candidate, or a candidate's authorized committee, and contributions given to other political committees which support a number of candidates and which may engage in other political activity. The Act also does not distinguish contributions to a committee of money from in-kind contributions of administrative support.[17] Administrative support to a political committee by its sponsoring organization is limited in the same manner as a contribution to a candidate, or the candidate's authorized committee.[18] The majority below makes a similar error in sustaining § 441a(a)(1)(C) without acknowledging the functional difference between contributions to candidates and support for a political committee. *CMA v. FEC*, J.A. at A-6-A-18, CCH at 50,990-50,994.

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[16] *E.g.*, § 441a(a)(7)(B)(i) treats expenditures made in cooperation with a candidate as contributions. Section 441a(a)(8) prevents avoidance of contribution limits by earmarking contributions for a candidate. *See* 11 C.F.R. § 110.6.

[17] According to 11 C.F.R. § 100.7(a)(1)(iii)(1980) the definition of contribution encompasses "anything of value" including in-kind contributions.

[18] Contribution is defined in § 431(8)(A), formerly § 431(e), to include anything of value given to a political committee. 11 CFR § 100.7a(a)(1)(iii). Problems of vagueness and the chilling effect of this definition are discussed below. *See Buckley v. Valeo*, 424 U.S. at 40-45.

The absence of any distinction between the regulation of contributions to candidates or their authorized committees, and contributions to a political committee, particularly contributions of administrative support for a multicandidate committee, is constitutionally defective under *Buckley*. Contributions to a political committee are functionally distinct from contributions to a candidate. As noted by Judge Wallace in dissent:

> Section 441a(a) (1) (C), in contrast, regulates an entirely different relationship: that of donor ('person') to committee. The purposes behind the contribution limits approved in *Buckley* and the donation restriction in section 441a(a)(1)(C) are necessarily distinguishable because a different relationship is being regulated. The majority simply ignores these differences which distinguish our case from *Buckley*.

CMA v. FEC, J.S. at A-69, CCH at 51,011; *see Buckley v. Valeo*, 424 U.S. at 244 (Burger, C.J., concurring and dissenting). The rationale used in *Buckley* to sustain a limit on contributions to candidates, the prevention of corruption or the appearance of corruption, 424 U.S. at 26-28, cannot be applied to sustain a limit on support for political committees. *CMA v. FEC*, J.S. at A-63-A-64, CCH at 51,009 (Wallace, J., concurring and dissenting); *see Common Cause v. Schmitt*, No. CA 80-1609, *FEC v. Americans For Change*, No. CA 80-1754 (D.C.D.C. Sept. 30, 1980) (three-judge court) (consolidated opinion), slip op. at 17-19, Appendix G at A-37 - A-39. This is so because of the functional affinity of contributions to a political committee and independent expenditures.[19] It is for the same reasons

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[19]*See* Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments*, 86 Yale L.J. 953 (1977). The author provides a detailed analysis of *Buckley* and distinguishes contributions to candidates from contributions to political committees. Contributions

the anti-corruption rationale failed to justify regulation of independent expenditures that a limit on contributions to political committees cannot be sustained.

The considerations which caused the Court in *Buckley* to distinguish independent expenditures from direct contributions and invalidate limits on independent expenditures apply to § 441a(a) (1) (C), and in particular to the limitation of administrative support by an unincorporated association for its political committee. Contributions and independent expenditures constitute forms of protected speech. *Buckley v. Valeo,* 424 U.S. at 19-23. Both also constitute forms of political association. *Id.* at 22. The Court found fundamental differences between contributions and independent expenditures and held that contributions to candidates are akin to vicarious speech. Limits on contributions to candidates allow symbolic expression by contributors in the form of a limited contribution but do not infringe on discussion of issues by the contributor. *Id.* at 21. Limits on independent expenditures unduly infringe freedom of speech and of association and were therefore held unconstitutional.[20] *Id.* at 22.

In analyzing the rights of contributors and persons making independent expenditures, the Court emphasized the right to associate and stated that a limit on expenditures:

> . . . precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. *NAACP v. Alabama,* . . . The Act's constraints on the ability of *independent associations* and campaign organizations to expend re-

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to political committees are placed in a "third classification" called donations and are distinguished from contributions to candidates or independent expenditures. *Id.* at 957-961.

[20] *Id.* at 955-956.

> sources on political expression "is simultaneously an interference with the freedom of [their] adherents." *Sweezy v. New Hampshire.* . . . (Emphasis added.)

424 U.S. at 22.[21] The opinion also relies on *NAACP v. Alabama,* 357 U.S. 449 (1958), for the proposition that an individual has a first amendment right to *effective* speech through participation in an effective political organization, a conclusion sustained in, *e.g., Kusper v. Pontikes.* 414 U.S. 51 (1973); *NAACP v. Button,* 371 U.S. 415 (1960); and *Bates v. City of Little Rock,* 361 U.S. 516 (1960).[22] For example, in *Griswold v. Connecticut,* 381 U.S. 479 (1965) the Court stated:

> . . . the right of 'association,' like the right of belief . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or affiliation with it or by other lawful means. *Association in that context is a form of expression of opinion.* . . .

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[21]In *Sweezy v. New Hampshire,* 354, U.S. 234, 250 (1957), the Court stated: "Our form of government is built on the premise that every citizen will have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political association."

[22]The importance of association for political purposes is emphasized by the increased participation of political action committees ("PAC's") in federal campaigns. Both the number of PAC's and the amounts contributed to candidates for the House and Senate increased dramatically in the 1970's. Epstein, *The PAC Phenomenon: An Overview,* 22 Ariz. L. Rev. 355, n.1, 356-357 (1980); Sorauf, *Political Parties and Political Action Committees: Two Life Cycles,* 22 Ariz. L. Rev. 445, 451-452 (1980); Adamany, *PAC's and the Democratic Financing of Politics,* 22 Ariz. L. Rev. 569, 588-585 (1980). There was a substantial increase in the number of PAC's filing reports between 1974 and 1978, with total PAC expenditures rising from $36.9 million in 1976 to $77.8 million in 1978. At the same time contributions by PAC's to candidates increased from $20.5 million to $35.1 million. Adamany, 22 Ariz. L. Rev. at 588.

381 U.S. at 483 (Emphasis added). Thus, a political committee is merely a "medium through which its individual members seek to make more effective the expression of their own views." *NAACP v. Alabama,* 357 U.S. at 459.[23]

The Court held expenditure limits violated the first amendment, 424 U.S. at 39-51, acknowledging the vital role money plays in exercising these rights as follows:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . .
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> The expenditure limitation contained in the Act presents substantial rather than merely theoretical restraints on the quantity and diversity of political speech.

Id. at 19.[24] Association may conceivably be the only means for certain persons to participate effectively in the political process. With the existing reliance on mass media in

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[23]Note, *supra* n.19 at 958-959. The author notes that the collective expression of a political committee is the extension of the individual speech of its members. *See Common Cause v. Schmitt,* slip op. at 14-15, Exhibit G at A-34 - A-35.

[24]*See United States v. Auto Workers,* 352 U.S. 567, 594 (1957) (Douglas, J., dissenting); *Stoner v. Fortson,* 379 F.Supp. 704, 711 (N.D. Ga. 1974), where the court stated:

> "There can be little doubt that this right of freedom of association extends to the right of individuals to participate in political activity . . . membership in and of itself was not the crucial point, but rather the fact that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."

political campaigns, a collective voice may be essential.[25] *Id.* at 19. Collective political action is more feasible and influential than individual activity or autonomous speech. In light of the Act's limitation on individual contributions to candidates, contributions to a political committee may be the only effective way to participate in the electoral process. *See Common Cause v. Schmitt*, slip. op. at 14, Exhibit G at A-33. This fact was recognized in a recent study that notes the increased participation by political action committees and the effects of inflation.[26] Another example is *Pollard v. Roberts*, 283 F.Supp. 248 (E. D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968) where the court found an attempt to compel disclosure of a list of contributors violated the first amendment rights of the members of a political party, stating:[27]

> For better or for worse, the only means, apart from voting, whereby most people can participate effectively in politics is to affiliate themselves with a political party and to make financial contributions thereto, according to their respective means and inclinations. To

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Thus, the right to join together to support or advance particular beliefs and ideas should be protected by this principle, whether it be by membership in an organization furthering those beliefs or through contributions to a campaign. . . . Either way individuals are attempting to further their views and beliefs . . ."

[25]Note, *supra* n.19 at 959-960. The Court also noted the skyrocketing costs of political campaigns, 424 U.S. at 26.

[26]Institute of Politics, John F. Kennedy School of Government, Harvard University, *An Analysis of the Impact of the Federal Election Campaign Act*, 1972-78, prepared for the House Comm. on House Admin., 96th Cong., 1st Sess. (Comm. Print 1979) ("*FECA Impact Analysis*"). This study notes the increasing role of political action committees and recommends, *inter alia*, an increase in the individual contribution limit to $3,000. *Id.* at 2, 6-8. *See Epstein, Sorauf,* and *Alamany, supra,* n.22.

[27]Note, *supra* n.19 at 960.

> the extent that a public agency or officer unreasonably inhibits or discourages the exercise by individuals of their right to associate with others of the same political persuasion in the advocacy of principles and candidates . . . and to support those principles and candidates with their money . . . that agency or officer violates private rights protected by the First Amendment.

283 F.Supp. at 258.

Associations such as CMA and CALPAC are protected by the first amendment. *Buckley v. Valeo*, 424 U.S. at 58-59; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Under *Buckley* members of CMA and CALPAC have the right to associate in an effective manner for political purposes. When CMA provides goods and services for CALPAC, it exercises its rights and its members' rights under the first amendment. Limits on CMA's support directly infringe those rights, in particular the right to function effectively through the medium of a political committee.

As the analysis that follows will show, § 441a(a)(1)(C) unnecessarily infringes appellants' first amendment rights, particularly when the analysis focuses on administrative support. Support of a political committee permits effective association for political purposes through the committee. Administrative support should not be categorized with contributions to candidates or automatically labelled as a contribution.[28] The contributor-candidate nexus regulated by the limit on contributions is distinct from the relationship between political committees and their sponsors. Limits on administrative support not only reduce the committee's ability to make contributions, which are separately regulated by the Act, but they also reduce the committee's

[28]Note, *supra* n.19 at 962. The author concludes limits on contributions to political committees are invalid and distinguishes them from contributions and expenditures addressed in *Buckley*. *Id.* at 957-961, 973.

ability to make independent expenditures. The limit on support for political committees has the same ultimate effect that the Court in *Buckley* found objectionable, the restriction of political speech and the reduction of public discussion of the issues. *Buckley v. Valeo*, 424 U.S. at 17-19; *id.* at 241-243 (Burger, C.J., concurring and dissenting); *see, e.g., Mills v. Alabama*, 384 U.S. 214 (1966).

B. The Limit on Administrative Support Set By § 441a (a)(1)(C) Is Unconstitutional Under the Strict Standards of Review Used in Buckley v. Valeo

In analyzing the limitations on contributions and independent expenditures, the Court in *Buckley* found that the restrictions were subject to "the closest scrutiny" and that their constitutionality depended on whether the government's interest in the restrictions was sufficient to ". . . satisfy the exacting scrutiny applicable to limitations on core first amendment rights of political expression." *Buckley v. Valeo*, 424 U.S., at 25, 44-45; *see, Elrod v. Burns*, 427 U.S. 347, 362 (1976).[29] The Court rejected a conclusion by the court of appeals that the Act involved the regulation of conduct rather than speech.[30] Instead of the standard used in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court found that the regulation of contributions and expenditures involved speech rather than conduct. 424 U.S. at 16-17. Therefore, a strict standard of review was applied. *Id.* at 16, 65, n.76. The Court used a three-tier test and asked (1) whether substantial governmental interests existed to justify regulation; (2) whether the regulatory provisions directly and narrowly served these interests; and (3) whether the government's objectives could be achieved by other means that infringed less on

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[29] *Id.* at 961.

[30] *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc).

first amendment activity.[31] As demonstrated below, the $5,000 calendar year limit on administrative support fails these tests.

1. No Governmental Interest Justifies a Limit on Administrative Support for a Political Committee

The primary purpose of the Act is to limit the actuality and appearance of any "quid pro quo" arrangements between a contributor and a candidate. *Buckley v. Valeo,* 424 U.S. at 26-27. A candidate's dependence upon the support of contributors undermines the integrity of the electoral process, and the appearance of corruption created by public awareness of the opportunities for abuse would erode confidence in the electoral process.[32] *Id.* at 25-28. In finding limitations on contributions to candidates were directly and narrowly related to legitimate ends, the Court stated the restrictions focused "precisely upon the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified . . ." *Id.* at 28. The Court also found an absence of any less intrusive alternative means to achieve the legitimate governmental purpose of mitigating the potential for "quid pro quo" corruption and of reducing the appearance of corruption. *Id.* at 27-28.[33]

Limits on independent expenditures could not be sustained. No substantial governmental interest justified the burden placed on first amendment rights. Unrestricted in-

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[31]Note, *supra* n.19 at 962; Comment, *Buckley v. Valeo, The Supreme Court and Federal Campaign Reform,* 76 Col. L. Rev. 852, 861 (1976). The question of precisely what standard the Court applied is in dispute. Judge Wallace found that the decision began with "strict scrutiny," but then evolved into a balancing test. *CMA v. FEC,* J.S. at A-61, n.23, CCH at 51,008 (concurring and dissenting opinion).

[32]Note, *supra* n.19 at 962.

[33]*Id.* at 963.

dependent advocacy limited by former 18 U.S.C. 608(e)(1) did not pose dangers either real or apparent of corruption.[34] *Id.* at 46. Independent advocacy and the interest in uninhibited speech protected by the first amendment could be protected if expenditure limitations were invalidated without jeopardizing valid interests underlying the Act. *Id.* at 49. Limits on independent expenditures were overbroad and had to be narrowly interpreted to avoid unconstitutional vagueness. *Id.* at 45-46, n.53. The Court found the restriction on truly independent activity had little corruptive potential. By their very independence the expenditures subject to the limitation ". . . may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[35] *Id.* at 47. The Court stated:

> The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that the expenditures will be given as *quid pro quo* for improper commitments from the candidate.

Id. at 47.[36]

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[34]*Id.*

[35]*Id.* at 964. It is interesting to note the reluctance of political action committees to make independent expenditures. See *FECA Impact Analysis, supra* n.26 at 111-112. Such expenditures may not always be in the candidate's best interest. *See Common Cause v. Schmitt,* slip op. at 16, Exhibit 9 at A-36.

[36]The limit on independent expenditures was also found to be unconstitutionally underinclusive. Narrowly construing the definition of independent expenditures to avoid unconstitutional vagueness, the Court found the provisions could only apply to expenditures expressly advocating the election or defeat of a clearly identified candidate. As redefined, the limitation on expenditures would not apply to advocacy in more general terms and did not rationally relate to the intended purpose because:

> . . . no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend

The $5,000 calendar year limit on the amount CMA may contribute as administrative support to CALPAC infringes first amendment rights. Like the limit on independent expenditures, it is unrelated to a valid governmental purpose. *CMA v. FEC,* J.S. at A-62-A-72, CCH at 51,009-51,012 (Wallace, J., concurring and dissenting). The limit does not control the amounts contributed to an individual candidate. Administrative support merely enhances the committee's ability to engage in political activity, including but not necessarily limited to making contributions to candidates. Contributions by political committees to candidates are already subject to either the $1,000 or $5,000 limit of § 441a(a)(1)(A) or § 441a(a)(2)(A). The majority below failed to fully appreciate the impact these limits and the anti-evasion provisions of §§441a(a)(7) and (8) have on potential abuse. In comparison to the other limits which operate directly on the contributor-candidate nexus, the limit on support for a committee fails to provide direct protection against the quid pro quo corruption which the Act was designed to preclude. While it may be argued that a limit on monetary contributions to a political committee is a necessary feature of the anti-evasion provisions of § 441a, as applied to limit administrative support § 441a(a)(1)(C) fails the initial test applied in *Buckley.* It serves no function reasonably related to valid purposes of the Act.

2. Section 441a(a)(1)(C) Is Overbroad

If the government's legitimate purposes can be served by less drastic means, which are less intrusive of first amendment rights, the statute cannot stand. *E.g., Elrod v. Burns,* 427 U.S. at 363; *United States v. Robel,* 389 U.S. 258, 268 (1967); *Shelton v. Tucker,* 364 U.S. 469, 488 (1960). In

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unlimited amounts of money in order to obtain improper influence over candidates for elective office.

424 U.S. at 45. Note, *supra* n.19 at 964-965.

Buckley the Court found limits on independent expenditures failed to focus directly and narrowly on a valid governmental interest. Likewise, § 441a(a)(1)(C) does not meet the requirement that a statute regulating first amendment activity be narrowly tailored to achieve the government's legitimate ends. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 100 S.Ct. 2326 (1980).

Section 441a(a) (1) (C) is overinclusive as a means of preventing actual or apparent corruption because it regulates the relationship between a multicandidate political committee and its donors, as distinguished from the relationship between contributors and candidates or their authorized committees. The government's interest in stemming corruption, or the appearance of corruption, depends instead on the regulation of the eventual use of funds by the political committee. Regulation of administrative support has at best a marginal bearing on the use of those funds in campaigns. Instead, it is the potential for corruptive influence resulting from contributions made by a political committee to candidates which is properly regulated under *Buckley.* In regulating the relationship of donor to committee, § 441a(a) (1) (C) deals with transactions one step removed from direct contributory activity. In the process first amendment activity protected under *Buckley* is burdened beyond the degree necessary to further the government's interest. *See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 100 St.Ct. 2343 (1980).

Political committees are already subject to a wide range of limitations on contributions, including various reporting requirements.[37] Even if CMA could provide un-

[37]Committees must register pursuant to § 433. Periodic reports of contributions and expenditures are required by § 434. Contributions are not only limited in amount but under §§ 441a(a)(7)

limited support to CALPAC, the potential for corruption from this support is subject to existing limits on contributions by CALPAC to candidates for federal office. As far as preventing the appearance of corruption, it would be impossible for recipients of contributions from CALPAC to determine with certainty the source of a particular contribution whether an individual, the CMA or another donor. A multicandidate political committee insulates donors from actual or apparent quid pro quo arrangements with candidates.[38] These committees stand between candidates and the original source of contributions. The political committee is, of course, subject to the limits on contributions to candidates in §§ 441a(a)(1)(A) and (2)(A) and no matter how much the committee has on hand to contribute the ability to contribute to individual races is restricted. To the extent a committee must pay its own operating expenses, rather than receive support from its sponsor, the total amount available for making contributions is diminished. The ultimate purpose of the Act is not to limit the total amount which a committee may spend on political action, but rather to prevent corruption in individual campaigns. Limits which in effect diminish the total amounts available to the committee for use as contributions or expenditures sweep too broadly and reduce the overall level of first amendment activity, contrary to the basic purpose of the first amendment that political debate be robust and wide-open, *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Like other political committees, CALPAC may make independent expenditures as well as direct contributions to candidates. To the extent it makes independent expenditures CALPAC engages in first amendment activity that

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and (8) expenditures which are coordinated with a candidate, and earmarked contributions are treated as contributions for purposes of the limits set by §§ 441a(a)(1) and (2).

[38]Note, *supra* n.19 at 967-968.

cannot be limited given the result in *Buckley*. If funds available for use as independent expenditures must be used to defray operating costs because of the limit on CMA's administrative support, the level of expenditures will suffer a resultant decrease. Judge Wallace observed:

> A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the section 441a(a)(1)(C) donation restriction to the contribution limitation upheld in *Buckley*.

J.S. at A-63, CCH at 51,009 (concurring and dissenting opinion.) Judge Wallace concluded that § 441a(a)(1)(C) is invalid since the speech interests being regulated are comparable with the expenditure limits invalidated by *Buckley*. J.S. at A-64, CCH at 51,009. Thus, a limitation on support for a political committee sweeps too broadly by inhibiting expenditures protected under *Buckley*. *But see Mott v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9134 (D.C.D.C. 1980), *appeal docketed*, No. 80-1945 (D.C. Cir. Aug. 12, 1930), where the court sustained § 441a(a)(1)(C) as applied to limit contributions to a committee earmarked for use as independent expenditures.

The overbreadth of § 441a(a)(1)(C) not only limits the committee's ability to make independent expenditures, but also infringes on associational rights. Without support from a sponsoring organization that can be used to underwrite the committee's operating expenses, donors may be reluctant to contribute to the committee because such contributions will be used for operating costs rather than direct political activity. Judge Wallace's dissent noted the costs inherent in operating a committee and the con-

comitant disincentive for contributors to donate, thus inhibiting the committee's ability to operate effectively. *CMA v. FEC,* J.S. at A-65, CCH at 51,009-51,010.

Section 441a(a)(1)(C) lacks the extreme precision and specificity required when first amendment rights are regulated. The classic statement appears in *NAACP v. Button,* 371 U.S. 415, 432-433 (1963):[39]

> [S]tandards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate only with narrow specificity.

The limits set by § 441a(a)(1)(C) require a determination of the precise meaning of the definition of "contributions" contained in § 431(4) in the context of support furnished to a committee.[40] In-kind contributions of administrative support may be difficult to value. It is also difficult to determine what contributions of administrative support are to be considered payments "made for the purpose of influencing" a federal election within the meaning of former § 431(e)(1) or current § 431(8)(A). *See Buckley v. Valeo,* 424 U.S. at 41-44, n.52, where the Court narrowly construed limits on independent expenditures in an attempt to preserve the statute. There are also likely to be problems

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[39]Likewise in *Buckley* the Court stated:

> Vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." (Citations omitted.)

424 U.S. at 41, n.48.

[40]The district court's opinion in *FEC v. CMA,* while providing some guidance, does not delineate precisely what administrative support constitutes a contribution when the committee engages in political activity in addition to direct contributions. Slip op. at 4-11, Appendix F at A-5 - A-16.

with allocation and accounting.[41] Given the vagueness of the Act and FEC regulations, and the Commission's unpredictable interpretations of both,[42] it is difficult to see how the limit on administrative support could do anything except chill federal election activities by an unincorporated association and its political committee.[43] The overbreadth of § 441a(a)(1)(C) has the net effect of curtailing CALPAC's willingness to participate in federal campaigns.

Despite the majority's assertion that § 441a(a)(1)(C) is closely tailored to achieve legitimate ends, the statute is overbroad and fails the test of directly and narrowly serving the intended purpose of the Act, particularly where administrative support is concerned.

3. Less Intrusive Means Already Regulate Political Committees

In *Buckley* the Court also asked whether less intrusive alternative means could have been used to achieve legitimate objectives. This is necessary because:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental per-

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[41] *FEC v. CMA*, slip op. at 10, n.7, Appendix F at A-14.

[42] *FEC v. CLITRIM*, 616 F.2d at 54-55 (Kaufman, C.J., concurring); *See, Clagett & Bolton, supra* n.11 at 1353-1360, and in particular notes 111 and 116 at 1354; Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 Ariz. L. Rev. 373, 419 (1980).

[43] *See Broadrick v. Oklahoma*, 413 U.S. 601, 621-623 (1973) (Brennan, J., dissenting). The pendency of the existing enforcement action has had an impact. In the 1978 primary CALPAC made contributions to thirteen Congressional candidates. No contributions were made in the November, 1978 general election, held after CMA and CALPAC were advised the Commission had found reason to believe a violation of § 441a(a)(1)(C) had occurred. CALPAC's contributions since January 1, 1979 to federal candidates have been negligible.

> sonal liberties when the end can be more narrowly achieved. The breadth of . . . abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 469, 488 (1960). Here less intrusive means are already in operation, obviating the need for a $5,000 calendar year limitation on contributions of administrative support to a political committee.[44]

Contributions to a committee authorized by a candidate to accept contributions are considered to be contributions "made to such candidate," pursuant to § 441a(a)(7)(A). Such contributions apply to a donor's contribution limitation with respect to that candidate set by § 441a(a)(1)(A) or § 441a(a)(2)(A) and the overall limit on contributions of $25,000 per year in § 441a(a)(3). Potential abuse from contributions which appear to be independent but which are actually coordinated by a candidate is also addressed. Expenditures made in cooperation or concert with a candidate must be treated as a contribution under § 441a(a)(7)(B)(i). Re-publication or dissemination of materials produced by a candidate is likewise treated as a contribution under § 441a(a)(7)(B)(ii). Contributions to a committee which have been "earmarked" for a particular candidate are also considered contributions applicable to a contributor's limits with respect to a particular candidate, pursuant to § 441a(a)(8) and 11 C.F.R. § 110.6. The same section treats contributions through an intermediary or conduit as contributions from the original source not the intermediary. Contributions to the maximum allowed by law directly to both a candidate and committees likely to support the candidate are only authorized if the committees are not authorized by the candidate, the contributor does not give with the knowledge that a substantial portion of the con-

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[44]Discussed in *Sproul, supra* n.22 at 493.

tribution will be contributed to that particular candidate, or the contributor does not retain control over the funds contributed.[45] The so-called anti-proliferation provisions appear in § 441a(a)(5) and prevent the use of multiple committees subject to common control through which contributions can be directed to a specific candidate. For purposes of the contribution limitations, all political committees "established or financed or maintained or controlled" by the same entity are considered a single political committee and in the aggregate are subject to a $1,000 or $5,000 limit per federal candidate per election.[46] *See, Walther v. Federal Election Commission,* 468 F.Supp. 1235 (D.C.D.C. 1979).

Thus, a comprehensive anti-evasion scheme exists. The additional burden of limits on support for a political committee is unnecessary. These provisions regulate the relationship between contributors and the recipient candidate, or the candidate's authorized committee.[47] They deal with the contributor-candidate nexus and transactions which have a significant potential for actual or apparent corruption. In contrast, limits on administrative support for a political committee perform no essential function in preventing the evasion of contribution ceilings. It is not a legitimate "loophole-closing" provision. *Buckley v. Valeo,* 424 U.S. at 45. Even with respect to monetary contributions to a committee, the limits are of marginal significance in light of the anti-evasion statutory scheme. Less drastic, alternative means, more reasonably related to a permissible purpose, are already in effect. The majority simply fails to recognize the relationship of these pro-

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[45]Note, *supra* n.19 at 968-970. 11 C.F.R. § 110.1(h). See 11 C.F.R. §§ 110.1-110.13 (1980) for detailed regulations governing contribution and expenditure limitations.

[46]Note, *supra* n.22 at 970. 11 C.F.R. §§ 100.5(g), 110.3 (1980).

[47]*Id.* at 971.

visions and sounds a false alarm in asserting § 441a(a)(1)(C) is necessary to prevent "funneling" of contributions to candidates. *CMA v. FEC*, J.S. at A-7, CCH at 50,990.

The existing range of limitations on contributions to candidates and their committees is sufficient to advance the valid purposes of the Act. The government's purpose in protecting the integrity of the electoral process cannot be pursued by means that broadly stifle first amendment rights. Contributions to political committees, particularly contributions of administrative support, are not inherently corruptive. The restrictions imposed by § 441a(a)(1)(C) do not directly advance a valid governmental interest, particularly since there are other existing measures more closely designed to control evasion of the limitations on contributions to candidates.[48] For this reason, § 441a(a)(1)(C) is unconstitutional, particularly to the extent it limits administrative support.

III

THE OFFENDING PROVISIONS OF THE ACT DISCRIMINATE AGAINST UNINCORPORATED ASSOCIATIONS AND THEIR POLITICAL COMMITTEES IN VIOLATION OF THE FIFTH AMENDMENT

While § 441a(a)(1)(C) limits contributions by any person to a political committee to $5,000 per calendar year, § 441b(b)(2)(C), § 431(8)(B)(vi) and § 431(9)(B)(v) create an exemption from the $5,000 limitation for payments by a corporation or labor organization, made for the establishment, administration or solicitation of contributions to a political committee.[49] Appellants contend these provisions

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[48] *Id.* at 973.

[49] § 431(e)(5)(F) and 431(f)(4)(H) were renumbered as § 431(8)(B)(vi) and § 431(9)(B)(v), respectively, by the 1979 Amendments, *supra* n.2. In the court of appeals, appellants argued the

are unconstitutional to the extent they exclude unincorporated associations and their political committees from the exemption to § 441a(a)(1)(C).

Equal protection analysis in the first amendment area is the same as under the fourteenth amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Unincorporated associations may be treated differently than corporations or labor organizations but the classification must at least be rationally related to a legitimate legislative purpose. *Eisenstadt v. Baird*, 405 U.S. 438, 447-448 (1972). When fundamental interests are affected the classification can only be sustained when a compelling governmental interest is demonstrated. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). No rational basis, much less a compelling interest, exists to justify differing regulation of administrative support by

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reference to membership organizations in § 441b(b)(2)(C) was intended to include all membership organizations, whether incorporated or unincorporated, and that this provision along with its definitional counterparts could be construed to allow unlimited administrative support by an unincorporated association for its political committee. The entire court rejected this construction. *CMA v. FEC*, J.S. at A-18-A-21, CCH at 50,994-50,995; J.S. at A-47-A-57, CCH at 51,003-51,005 (Wallace, J., concurring and dissenting), on the ground § 441b(b)(2)(C) was limted to corporations and labor organizations. Judge Wallace also relied on the absence of any cross-reference in the definitional provisions contained in § 431, J.S. at A-51, n.17, CCH at 51,005, and on legislative history. The comments by Senator Allen which Judge Wallace relied on are themselves ambiguous, with Senator Allen stating at one point:

> The amendment I have would allow cooperatives, nonstock corporations, and membership organizations to set up the same type of segregated funds as a corporation with stock and stockholders or labor organizations.
>
> Why should they be prevented from setting up funds? They are as interested in good government as the corporations with stock and stockholders and labor organizations.

unincorporated associations for their political committees, as compared to support by corporations and labor organizations and their political committees.[50]

A. The Statutory Scheme Fails to Satisfy the Rational Basis Test

The impact of the Act's distinction between unincorporated entities and corporations or labor organizations is real and substantial—the difference between a $5,000 calendar-year ceiling on administrative support and no ceiling at all.[51] The distinction becomes more curious when incorporated and unincorporated associations are compared. Numerous unincorporated membership organizations operate political committees and in a broad sense such organ-

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I believe he would see the merit of allowing nonstock corporations, cooperatives and membership organizations to set up segregated political funds and allow solicitation of the members of such organizations for contributions to that fund.

122 Cong. Rec. 7179 (March 18, 1976), reprinted in FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1976.*

[50]Analysis here is limited to administrative support since § 441b (b)(2)(C) speaks only in terms of such support.

[51]In *FEC v. CMA* the district court found that CMA's in-kind support for CALPAC totalled $79,517 during May 11, 1976—December 31, 1976, $104,135 in 1977 and $134,981 in 1978. Apportioning these amounts according to the ratio of federal/state contributions, the Court determined that in 1976 in-kind support totalling $14,631.13 was attributable to $25,950 in federal contributions. In-kind support in 1977 totalled $11,350.72, attributable to federal contributions of only $6,800. In 1978 in-kind support totalled $8,233.84, attributable to federal contributions of $21,300.00. Slip op. at 3, 10, Exhibit F at A-3, A-15.

izations are all basically similar to the extent they operate to further the interests of their members.[52]

It is not apparent how the purpose of preventing corruption or the appearance of corruption can be furthered by unequal treatment of unincorporated associations when compared with corporations and labor organizations. If anything, allowing corporations and labor organizations to provide unlimited support for their political committees appears to be contrary to the purpose of the Act as there is no assurance corporations or labor organizations would not attempt to use administrative support to evade other restrictions. *CMA v. FEC*, J.S. at A-70-A-71, CCH at 51,011-51,012 (Wallace, J., concurring and dissenting.) Appellants are mindful that § 441b(b)(2)(C) and its definitional counterparts may be constitutionally required by *Pipefitters Local 562 v. United States*, 407 U.S. 385 (1972). This does not explain the absence of a similar dispensation for unincorporated associations. Encouraging unincorporated organizations to forego the use of a political action committee and to participate directly in political activity may lead to practices contrary to the purpose of the Act. For instance § 441b(b)

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[52]For example, the American Dental Association is an incorporated association. *See California Dental Ass'n v. American Dental Ass'n*, 23 Cal. 3d 346, 350 (1976). It sponsors a multicandidate committee, the American Dental Political Action Committee. FEC, *Index of Multicandidate Political Committees*, 3 (May 15, 1979). The American Medical Association is an incorporated membership organization. *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). It sponsors a political Action Committee, the American Medical Political Action Committee (AMPAC). FEC, *Index* at 4. The FEC Index lists numerous other membership organizations that sponsors political committees. *E.g.*, the American Chiropractic Association, American Occupational Therapy Association, American Optometric Association, American Physical Therapy Association, American Podiatry Association, National Education Association, and National Associations of Realtors.

(3)(A) makes it unlawful for a separate segregated fund sponsored by a corporation or labor organization to use undue means to obtain contributions.[53] By using a political action committee, CMA has chosen a voluntary program of political action. Limiting CMA's administrative support of CALPAC encourages political activity by CMA using general funds not specifically donated for political purposes. While this is legally permissible, an unincorporated association's use of funds not explicitly contributed for political purposes to make contributions to candidates is contrary to the purpose of the Act and the voluntarism required for corporate and labor PAC contributions. *See, e.g., Pipefitters Local 562 v. United States*, 407 U.S. at 412; *United States v. Automobile Workers*, 352 U.S. 567, 572 (1957); *cf. Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Appellants are unaware of any showing that "the relative voice of [unincorporated associations] has been overwhelming or even significant . . . or that there has been any threat to the confidence of the citizenry in government," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978), to justify limits on administrative support.

Corporations and labor organizations have broad latitude to engage in effective political action.[54] While §441b (a) prohibits contributions by corporations or labor or-

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[53]§ 441b(b)(3) provides "It shall be unlawful—(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, or financial reprisal or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction." *See Pipefitters Local 562 v. United States*, 407 U.S. 385, 412 (1972) (voluntary contributions to a separate segregated fund do not violate the ban on contributions by labor organizations).

[54]*Sproul, supra* n.19 at 472-492 contains a detailed discussion.

ganizations,[55] several provisions benefit corporations and labor organizations.[56] Under § 441b(b)(2)(A) communications by a corporation to its stockholders and executive or administrative personnel or their families are permitted in unlimited amounts. The same section permits a labor organization to communicate with its members and their families on any subject without limit. These provisions allow corporations and labor organizations to engage in extensive political activity with their stockholders and executive or administrative personnel and their families, or the members of a labor organization and their families, respectively.[57] Under § 441b(b)(2)(B) corporations may engage in "nonpartisan registration and get-out-the-vote campaigns" aimed at stockholders and executive or administrative personnel and their families. Labor organiza-

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[55]It is questionable if these limitations are still valid. *First National Bank of Boston v. Bellotti,* 435 U.S. at 803 (White, J., dissenting).

[56]In *Republican Nat. Committee v. FEC,* 616 F.2d 1 (2d Cir. 1980) (three-judge court) *aff'd,* 100 S.Ct. 1639, the Second Circuit rejected the argument that § 441b, other provisions of the Act and the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001, *et seq.*, discriminated in favor of candidates supported by labor as compared to candidates supported by corporations. As to corporations and labor organizations the court found the Act neutral. Findings of fact regarding corporate and union activity are printed in *Republican Nat. Committee v. FEC,* Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9101 (1979) at 50,805-50,806 (S.D.N.Y. 1979).

[57]*See* remarks by Senator Cannon citing the Sun PAC advisory opinion and the existence of over 30 million individual shareholders and 18 million union members, 122 Cong. Rec. S3518 (daily ed., Mar. 16, 1976); remarks of Senator Packwood, *id.* at S3554-3555; and in particular Congressman Vander Jagt's discussion of union communications, 122 Cong. Rec. H2657 (daily ed., April 1, 1976). The legislative history is reprinted in FEC, *The Legislative History of the Federal Election Campaign Amendments of 1976. See also, Bolton, supra* n.42 at 415, concluding § 441b favors labor so far as grass roots activity is concerned.

tions may do the same with their members and families. Under §§ 441b(b)(4)(A) and (B), corporations and labor organizations may engage in unlimited solicitation of their stockholders, their families and executive personnel or their members and their families, respectively. These provisions also allow two written solicitations yearly of any stockholder, executive or administration personnel or employee of a corporation or their families. Under § 441b (b)(5) any method of soliciting contributions available to a corporation is available to a labor organization. Under § 441b(b)(6) a corporation must make available certain solicitation methods to a labor organization representing members working for the corporation. FEC regulations allow use of corporate and union facilities, means of transportation and appearances by candidates or political parties.[58] The provisions outlined above permit vigorous activity to influence and solicit those most likely to respond.

Even though an unincorporated membership organization may contribute directly to a candidate, contributions remain subject to the limits of § 441a(a)(1)(A) or § 441a(a)(2)(A).[59] The opportunity to solicit without limit is not co-extensive with the practical ability to raise funds. Unlimited solicitation efforts by an interest group with respect to a large portion of the public would not result in meaningful returns. The opportunity to solicit the public does not afford a significant benefit in the context of the statutory scheme particularly when the costs of such a solicitation would be paid by CALPAC, except for up to

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[58]11 C.F.R. §§ 114.3(C)(2), 114.4(b), 114.9, 114.12(b) (1980).

[59]Contributions by an unincorporated membership organization and its political committee to the same candidate would probably also be subjected to the anti-proliferation rule of § 441a(a)(5) and 11 C.F.R. § 110.3 which places an aggregate limit on contributions by affiliated committees. As a practical matter there are important

$5,000 yearly. With well over 1,000 PAC's currently in existence much of the public is already represented by a political committee connected with the appropriate affinity group.[60] It is the opportunity to solicit its own members which is of the most benefit to CMA.[61] The alleged balanced regulatory scheme leaves CMA and CALPAC with unlimited solicitation rights which as a practical matter may be of no practical value because of the limit on administrative support, while corporations and labor organizations are permitted effective solicitation and unlimited administrative support.

B. The Offending Provisions of the Act Fail to Satisfy the Compelling Interest Test

Political association is at the core of the first amendment. *Buckley v. Valeo*, 424 U.S. at 14-15; *Elrod v. Burns*, 427 U.S. at 356-357. A classification which infringes the exercise of first amendment rights can only be sustained if there is a compelling interest to support regulation. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *United States v. Robel*, 389 U.S. 258 (1967). There is a significant societal interest in promoting the exercise of first amendment rights, as well as an individualized interest. *First*

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considerations that would prevent many associations from making direct contributions at all, including the potential loss of members. *See First National Bank of Boston v. Bellotti*, 435 at 794, n.34.

[60]Professor Epstein notes that 1,153 PAC's registered with the FEC are affiliated with corporations, 290 are affiliated with labor, and approximately 1,000 other PAC's are affiliated with trade/member/health organizations, cooperatives, corporations without capital stock or have no-connected organization. *Epstein, supra*, n.22 at 356.

[61]Even this is of limited benefit since less than a majority of CMA members donate to CALPAC. The district court found that only 7,000-10,000 of CMA's approximately 25,000 members contributed to CALPAC during 1976-1978. *FEC v. CMA*, slip op. at 2, Appendix F at A-2.

National Bank of Boston v. Bellotti, 435 U.S. at 776. Support for a political action committee, and the discussion of public issues and candidates which results from contributions or expenditures by the committee, is just the type of activity the first amendment protects. Discussion of public issues and candidates is integral to American government, and in the framework of equal protection a compelling interest is necessary to override it. *Buckley v. Valeo*, 424 U.S. at 14-15. Restrictions are only valid in the first amendment context if they "survive exacting scrutiny." *Id.* at 16, 94; *Elrod v. Burns*, 427 U.S. at 362.

The $5,000 calendar year limit imposes a restriction on CMA's participation in the electoral process through the medium of a political action committee and a resulting diminution of direct contributions, independent expenditures or other political activity by the committee. This has the ultimate effect of reducing the total amount contributed to candidates and hence reduces first amendment activities.[62] The importance of the first amendment, and the exercise of the rights guaranteed thereby is not diminished by the source of the activity. It is immaterial that an association or its political committee exercises these rights, because the first amendment was intended to protect the free discussion of governmental affairs and:

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.

First National Bank of Boston v. Bellotti, 435 U.S. at 777. The notion government "may restrict the speech of some elements of our society in order to enhance the relative

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[62]According to one study, since 1972 most campaigns have insufficient funds, and the most competitive sections are those where the most money is spent. *FECA Impact Analysis, supra*, n.26 at 1.

voice of others is wholly foreign to the First Amendment . . ." *Buckley v. Valeo*, 424 U.S. at 48-49.

There is no compelling reason to differentially regulate support by an unincorporated association for its political committee and support by corporations or labor organizations. Allowing corporations and labor organizations to make unlimited contributions to establish and administer a political committee permits them to operate more effective political action committees. As a result, corporations and labor organizations may participate to a greater degree in the electoral process through the medium of a political action committee. Their political action committees will have greater impact, per dollar received as voluntary contributions. The classification created by § 441b(b)(2)(C) imposes a burden on associational rights and discriminates against appellants solely because CMA is unincorporated. This enhances speech by some elements of society, a result prohibited by the first amendment. *Buckley v. Valeo*, 424 U.S. at 48-49. Like the classification in *Williams v. Rhodes*, which favored the two major political parties by placing unreasonable burdens on other political parties, so also do the offending provisions of the Act discriminate against unincorporated membership organizations and their political committees without any compelling justification.

CONCLUSION

The Court should exercise jurisdiction and answer all of the certified questions in the affirmative.

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Appendix F

United States District Court
Northern District of California

No. C-79-1197 WHO

Federal Election Commission,
Plaintiff,

vs.

California Medical Association and California Medical Political Action Committee,
Defendants.

[Filed Oct. 21, 1980]

OPINION

This is a civil enforcement action brought by the Federal Election Committee ("the FEC") against the California Medical Association ("CMA") and the California Medical Political Action Committee ("CALPAC") for alleged violations during 1976,[1] 1977, and 1978 of the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* (hereinafter cited as "FECA"). The FEC claims that CMA made contribu-

[1]The Federal Election Campaign Act was originally enacted in 1972, Pub.L. 92-225, 86 Stat. 11. After the Supreme Court struck down several of its provisions, *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress enacted significant amendments in 1976, Pub.L. 94-283, 90 Stat. 478. The 1976 amendments, which include the provisions in issue here, took effect on May 11, 1976. Thus, all references to alleged violations during 1976 refer only to the period between May 11, 1976, and December 31, 1976. The statute was again amended in 1980, Pub.L. 96-187.

tions to CALPAC in excess of $5,000 during each of those years, in violation of 2 U.S.C. § 441a(a)(1)(C), and that CALPAC knowingly accepted such contributions, in violation of 2 U.S.C. § 441a(f). The matter was tried to the Court upon stipulated facts as well as supplementary testimonial and documentary evidence. For the reasons set forth below, the Court holds that CMA and CALPAC have violated the cited statutory provisions and that judgment should be entered in favor of the FEC.

I

CMA is an unincorporated membership organization of approximately 25,000 individual physicians residing in California. Stipulations to findings of fact (hereinafter cited as "Stipulation") ¶ 2; testimony of Willis Babb. Prior to May 11, 1976, the date on which the statutory provisions in question took effect, CMA formed CALPAC, a nonpartisan political committee. Stipulation ¶¶ 3, 4. CALPAC is registered with the FEC as a political committee and has reported its affiliation with CMA, in compliance with 2 U.S.C. §§ 433, 431(4) and (7). Stipulation ¶¶ 3, 4. CMA directly pays CALPAC's administrative and operating expenses, including salaries, rent, office supplies, postage, computer services, and travel costs. Stipulation ¶ 5. In addition to such in-kind support provided by CMA, CALPAC receives cash contributions and dues from the approximately 7,000-10,000 physicians and their families who constitute its membership. Testimony of Babb and Allen Pross.

CALPAC makes contributions to and expenditures on behalf of candidates in state and federal elections. CALPAC also sponsors conferences and workshops to encourage doc-

tors to get involved in the political process, organizes lobbying expeditions to Washington, D.C., and spends a fair amount of time and money soliciting new members. Testimony of Pross, Babb, and Bradley Davis. CALPAC is run formally by a board of directors, which meets at least annually. Its key policymaking body is an executive committee composed of CALPAC's principal officers. Neither CMA nor the individual contributors to CALPAC specify the uses to which their donations should be put. Such decisions are left to CALPAC's discretion. The recipients and size of CALPAC's contributions to political candidates are determined by its executive committee, acting upon the recommendations of its federal and state candidate selection committees. Pross testimony. The following table indicates the value of CMA's in-kind contributions to CALPAC during 1976, 1977, and 1978, and the total contributions made by CALPAC to federal and state candidates during each of those years.

Table 1

	In-Kind Contributions from CMA to CALPAC	Contributions from CALPAC to:	
		federal candidates	state candidates
1976	$ 79,517	$25,950[2]	$145,685.07
1977	104,135	6,800	55,583.49
1978	134,981	21,300	329,134.30

Stipulation ¶¶ 6-8, 10-12.

In October and November, 1978, the FEC notified CMA and CALPAC first, that it had reason to believe, and sec-

[2]As initially introduced into evidence, Stipulation ¶ 10 stated that CALPAC contributed $32,950 to "clearly identified candidates in federal elections" in 1976. At trial, the parties amended the Stipulation to note that $7,000 of that total was given to the Republican National Committee rather than to any clearly identified candidate.

ond, that it had reasonable cause to believe, that they were violating the FECA because CMA was making and CALPAC was accepting contributions in excess of $5,000 per year. *See* former 2 U.S.C. § 437g(a)(2) and (5)(A) (1976). On April 19, 1979, the FEC determined that there was probable cause to believe that such violations had taken place during 1976, 1977, and 1978. *See* former 2 U.S.C. § 437g(a)(5)(B) (1976).

CMA and CALPAC, along with two individual members of CMA, then filed a declaratory judgment action. *California Medical Ass'n v. Federal Election Comm'n*, C-79-1089 WHO (filed May 7, 1979), *appellate decision on certified questions*, slip op. at 3371 (9th Cir., May 23, 1980) (hereinafter cited as *"CMA v. FEC"*). The doctors sought a declaration that the $5,000 limit on contributions by persons to political committees did not apply to in-kind contributions by unincorporated associations such as CMA and that, if it did, the statute was unconstitutional on its face as applied to CMA and CALPAC because it deprived them of their First Amendment right to free speech and their Fifth Amendment right to equal protection of the law. Two weeks after the doctors commenced their suit, the FEC filed this enforcement action.[3] The FEC sought declaratory and in-

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[3]The FEC's complaint alleged three claims for relief. The first claim—that CMA and CALPAC violated the $5,000 annual limit on contributions to political committees—was the subject of the trial and of this Opinion. The second and third claims—that CALPAC's Statement of Organization filed with the FEC was deficient in that it did not list the Los Angeles County Physicians Committee ("LACPC") as an affiliated or connected organization, and that CALPAC improperly aggregated with LACPC its contributions to a federal candidate—were resolved by a Consent Order filed on January 18, 1980.

junctive relief as well as the imposition of $5,000 civil penalties against each defendant. The defenses raised by CMA and CALPAC were virtually indentical to their affirmative claims in the declaratory judgment action.

Pursuant to the procedures mandated by FECA, this Court certified to the Ninth Circuit the constitutional questions raised in the doctors' declaratory judgment action. *See* 2 U.S.C. § 437h(a). While the parties presented those questions to the appellate court, they simultaneously conducted discovery and pretrial preparation in this enforcement action. Shortly before the scheduled commencement of trial, the parties filed cross-motions for summary judgment. At the oral argument on February 22, 1980, the Court deferred ruling on the summary judgment motions pending the development of a fuller factual record at trial. The trial then took place on March 17 and 18, 1980; three witnesses testified and seventy-five exhibits were admitted into evidence. On May 23, 1980, the Ninth Circuit issued its *en banc* decision in the declaratory judgment action. The court rejected the doctors' arguments, holding that the $5,000 limitation on contributions to political committees applies to in-kind contributions by unincorporated associations and that the statutory provisions which CMA and CALPAC are charged with violating do not infringe their constitutional rights.

II

The Ninth Circuit's resolution of the difficult constitutional and statutory issues has substantially narrowed the scope of this case. The sole remaining issue is almost technical in nature: when contributions to a political committee

are not earmarked for a particular use, and when a political committee uses such contributions for the purpose of influencing federal elections as well as for other purposes beyond FECA's regulatory embrace, how should it be determined whether the contributions exceed FECA's $5,000 limitation on aggregate annual contributions to a political committee?

The statutory section under which CMA has been charged prohibits any person from making "contributions" to any political committee which, in the aggregate, exceed $5,000 per year.[4] 2 U.S.C. § 441a(a)(1)(C). "Contributions" is also the crucial term in the statutory section under which CALPAC has been charged: "No * * * political committee shall knowingly accept any contribution * * * in violation of the provisions of this section." 2 U.S.C. § 441a(f). The statute defines "contribution" first by listing the items included within the general definition and second by listing several exclusions from that definition. 2 U.S.C. § 431(8), formerly 2 U.S.C. § 431(e). The definitional provision that was in effect when the "contributions" in question were made and when this case was filed has since been amended. However, the amendments pertinent to the issues raised here merely simplified the definition without affecting its substantive scope. *See* H. Rep. No. 96-422, 96th Cong., 1st Sess. 6-11, *reprinted in* [1979] U.S. Code Cong. & Ad. News

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[4]The limitation on contributions to political committees established and maintained by national political parties is separately set at $20,000 per year. 2 U.S.C. § 441a(a)(1)(B).

5070-5074.[5] As currently phrased, the general inclusive definition of "contribution" is:

> "(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office;* or
>
> (ii) the payment by any person of compensation for the *personal services* of another person which are

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[5]CMA and CALPAC contend that the recent amendments significantly changed the definition of "contribution." They rely on the fact that the definition in effect during 1976-1978 provided that the payment of a political committee's salary expenses was a contribution where the personal services were rendered "for any such purpose," presumably referring to the general definition of contribution as being made for the purpose of influencing the results of a federal election (or primary). Former 2 U.S.C. § 431(e)(4) and (e)(1) (1976). On the other hand, the amended definitional provision with respect to compensation for personal services rendered to a political committee simply refers to services rendered "for any purpose." 2 U.S.C. § 431(8)(A)(ii). The doctors cite no authority for their suggestion that the deletion of the word "such" represents a substantive modification of the definition. To the contrary, the legislative history of the 1980 amendments indicates that no substantive change was intended. The congressional committee report which accompanied the amendments mentions the addition and deletion of other phrases, but makes no mention of the deletion of "such." It is highly improbable that Congress would have highlighted minor amendments which made little or no substantive changes in the definition, while neglecting to note the more significant changes. *See* H.Rep. No. 96-422, 96th Cong., 1st Sess. 6-11, *reprinted in* [1979] U.S. Cong. & Ad. News 5070-5074.

rendered to a political committee without charge *for any purpose.*" 2 U.S.C. § 431(8)(A) (emphasis added).[6]

The language suggests that whereas donations in the form of money or goods are contributions *if* given to a political committee for federal electioneering purposes, donations in the form of personal services (other than volunteer services, *see* 2 U.S.C. § 431(8)(B)(i)) are automatically deemed to be contributions. In this case, it is undisputed that CMA paid CALPAC's salary expenses in excess of $5,000 during each of the years in question. Stipulation ¶¶ 6-8 (1976—$40,398; 1977—$41,029; 1978—$59,494). On that basis alone, it would be possible to find that the doctors violated the statutory limitation on contributions made to, and knowingly accepted by, a political committee. 2 U.S.C. §§ 441a(a)(1)(C) and 441a(f).

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[6]During the relevant time period (1976-1978), the general, inclusive definition of contribution was as follows:

"(e) "contribution"—

(1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of—

(A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party, or

(B) influencing the result of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;

(2) means a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for such purposes;

(3) means funds received by a political committee from another political committee or other source;

(4) means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candi-

However, the Court need not rely on a literal reading of statutory language drafted after CMA's alleged contributions were made. It is well established that the thrust of FECA is to regulate contributions and expenditures made for the relatively narrow purpose of influencing federal elections and that it does not reach activities designed more broadly to promote the discussion of political issues. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 79-80 (1976); *United States v. National Committee for Impeachment,* 469 F.2d 1135, 1140 (2d Cir. 1972). Assuming that CMA's donation of goods *and services* to CALPAC were "contributions" only if donated for the purpose of influencing federal elections, the outcome of this case clearly turns on ascertaining the purpose(s) for which the alleged contributions were made.

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date or political committee without charge for any such purpose, except that this paragraph shall not apply in the case of legal or accounting services rendered to or on behalf of the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services, other than services attributable to activities which directly further the election of a designated candidate or candidates to Federal office, nor shall this paragraph apply in the case of legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of insuring compliance with the provisions of this Act or chapter 95 or chapter 96 of Title 26 (unless the person paying for such services is a person other than the regular employer of the individual rendering such services), but amounts paid or incurred for such legal or accounting services shall be reported in accordance with the requirements of section 434(b) of this title." Former 2 U.S.C. § 431(e)(1)-(4).

Former § 431(e)(1)(A) and (B) were rephrased and carried forward in new § 431(8)(A)(i). Former § 431(e)(4) was rephrased and carried forward as new § 431(8)(A)(ii), with the exception regarding legal and accounting services carried forward as new § 431(8)(B)(ix). Former § 431(e)(2) and (3) were deleted.

As noted above, CMA did not specify the use to which CALPAC should put the donated goods and services. CALPAC did not maintain separate accounts to differentiate between funds used for electioneering in general and those used for educational and lobbying activities. CALPAC has no internal rules or guidelines for the distribution of its funds, and there are no specific items in the budget pertaining to federal as opposed to state electioneering. Stipulation ¶ 9; testimony of Pross, Babb, and Davis. Thus, it has become the Court's task to determine whether CMA's contributions were made for the purpose of influencing federal elections. There appear to be three alternative methods of performing that task. One method, urged by the FEC, is to presume that all contributions to a political action committee are made for the purpose of influencing federal elections. CMA would then bear the burden of rebutting that presumption by establishing that some or all of the contributions were made for other purposes. A second method, urged by CMA and CALPAC, is to require the FEC to prove that each contribution was made for the specific purpose of influencing federal elections. A third method is to allocate the dollar value of CMA's contributions according to the relative proportions of CALPAC's federal and nonfederal activities. For example, if CALPAC gave 75 percent of its candidate contributions to state candidates and 25 percent to federal candidates, then 25 percent of CMA's contributions to CALPAC would be deemed contributions within the meaning of FECA.

The Court is guided in the selection of an appropriate method by the general principles enunciated in other FECA cases, particularly the Ninth Circuit's recent de-

cision regarding the statutory provisions in issue here. The consideration of overriding significance is that although limitations on the amount of contributions to political committees may implicate First Amendment rights, contribution limitations only marginally restrict the exercise of those rights. *Buckley v. Valeo, supra,* 424 U.S. at 20-23.

> "In *Buckley* the Court granted the legislature substantial deference in drawing the Act's contribution limits, without insisting upon the most narrow of categories." *CMA v. FEC, supra,* slip op. at 3381.

By contrast, much less deference is accorded the legislature with respect to the regulation of expenditures by political committees and candidates because those expenditures are directly related to protected political speech. *Buckley v. Valeo, supra,* 424 U.S. at 20-23. Here, the doctors focus on FECA's First Amendment implications in support of their contention that the provisions in question should be narrowly construed and the FEC should be required to prove the specific purpose behind each contribution. However, virtually all of the cases which they cite in this regard involved the regulation of expenditures by, rather than contributions to, political organizations. In each case, the courts narrowly construed the statute to find that advertisements, leaflets, and posters discussing political issues unrelated to any particular election campaign were not "expenditures" subject to regulation or did not render the sponsoring organizations subject to regulation as "political committees" under FECA. *See FEC v. Central Long Island Tax Reform Immediately Committee,* 616 F.2d 45 (2d Cir. 1980) (re publication of antigovernment spending pamphlet); *United States v. National Committee for Impeach-*

ment, supra (re advertisement calling for the impeachment of President Nixon); *FEC v. American Federation of State, County & Municipal Employees,* 471 F.Supp. 315 (D.D.C. 1979) (re poster critical of then-President Ford's pardon of former President Nixon); *American Civil Liberties Union v. Jennings,* 366 F.Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats v. American Civil Liberties Union,* 442 U.S. 103 (1975) (re advertisement opposing the Nixon Administration's proposed legislation to limit the busing of school children). In this case, none of CALPAC's expenditures is in issue and there is no doubt but that CALPAC is a political committee subject to regulation under FECA. As the Ninth Circuit stated in rejecting the doctors' First Amendment challenge to the statute:

> "[A] political committee is, by design as well as definition, a natural conduit for candidate contributions and * * * the essential purpose of the provision here in question is to limit those contributions, not to limit expenditures for any other type of political advocacy. * * *
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> * * * * *
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> * * * A critical point in this case is that CMA and any other association may spend as much as it chooses to collect for political speech, including advocacy of a particular candidate's election. The limitation here in question applies only to candidate contributions and payments to multicandidate political committees. And the intrusive potential of the limitation is further diminished when it is noted that, as forcefully and often as it chooses, CMA can solicit its members, and anyone else, to give directly to CALPAC." *CMA v. FEC, supra,* slip op. at 3378-3379.

Another significant principle articulated by the Ninth Circuit is that the statutory provisions governing contributions to political committees should be construed so as to make meaningful and enforceable the dollar limits on such contributions.

> "We have already concluded that there is a legitimate purpose for a limit on an association's contributions to political committees. The administrative assistance provisions are simply a necessary part of this statutory scheme. The Act prevents evasion by including administrative assistance in computation of the dollar limit." *Id.* at 3385.

The above-quoted language compels this Court to reject the doctors' proposed method of computing contributions made for federal electioneering purposes, because to adopt that method would permit and invite CMA, CALPAC, and others similarly situated to evade FECA's contribution limits by using clever accounting practices. Inasmuch as CMA never indicates the purpose for which it makes its contributions to CALPAC, and CALPAC commingles all of its funds and uses all of its staff to promote various different purposes, it would be well-nigh impossible for the FEC to prove which of CMA's contributions were made for federal electioneering purposes. If the doctors' proposed method were employed, any political committee could flaunt with impunity the statutory contribution limits simply by being imprecise in its solicitations and bookkeeping. The fact that FECA does not govern contributions aimed at

influencing state elections would be converted into a means of effectively nullifying the statutory limitations on contributions aimed at influencing federal elections.[7]

Once the doctors' proposed method of computing contributions made for federal purposes is rejected, it becomes unnecessary in this case to choose between the two remaining methods. Even under the method more favorable to the defendants, whereby CMA's contributions to CALPAC are allocated according to CALPAC's state and federal contributions, the $5,000 limit was exceeded in each of

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[7]This is not to suggest that CMA and CALPAC would be penalized for not employing the accounting procedures outlined in the FEC's regulations. As of April 13, 1977, the FEC requires political committees involved in both state and federal election campaigns either to maintain a separate account solely for contributions and expenditures related to federal elections, or to establish a separate political committee "which shall receive only contributions subject to the prohibitions and limitations of the Act, regardless of whether such contributions are for use in connection with federal or non-federal elections." 11 C.F.R. § 102.5 (1980) (formerly 11 C.F.R. § 102.6). Where a solely-federal campaign committee is established, it is to "allocate administrative expenses on a reasonable basis between their Federal and non-Federal accounts in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis." 11 C.F.R. § 106.1(e). Neither regulation addresses precisely the situation involved here. Section 102.5 applies to financial contributions capable of being placed in a bank account, rather than to in-kind contributions. Section 160.1(e) pertains to expenditures by, rather than contributions to, political committees. However, the regulations are instructive insofar as they suggest feasible means by which CMA and CALPAC could comply with, and the FEC could enforce, the contribution limits where in-kind contributions are made to a multi-purpose political committee.

the years in question. The following table illustrates the application of the allocation method to the facts here:[8]

Table 2

	1976	1977	1978
1. CALPAC's contributions to federal candidates ..	$ 25,950.00	$ 6,800.00	$ 21,300.00
2. CALPAC's contributions to state candidates	145,685.07	55,583.49	329,134.30
3. % federal	18.4%	10.9%	6.1%
4. CMA's contributions to CALPAC	79,517.00	104,135.00	134,981.00
5. Amount attributable to federal purposes (line 3 × line 4)	14,631.13	11,350.72	8,233.84

Thus, the Court concludes that CMA violated 2 U.S.C. § 441a(a)(1)(C) during 1976, 1977, and 1978 by making contributions to CALPAC in excess of $5,000 per year.

The Court also concludes that CALPAC violated 2 U.S.C. § 441a(f) by knowingly accepting such excessive contributions from CMA during each of the years in question. The record clearly establishes that CALPAC knew that CMA was paying for its operating and administrative expenses and that CALPAC voluntarily and intentionally accepted CMA's in-kind payments. That CALPAC did not know whether in-kind contributions by unincorporated associations were subject to the $5,000 limit, a fact which no one "knew" until the Ninth Circuit's decision was handed down on May 23, 1980, does not save it from liability. CALPAC knew the facts (accepting in-kind contributions exceeding $5,000 from CMA) which rendered its conduct unlawful. Such knowledge is sufficient to create civil liability under

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[8]Data in lines 1, 2, and 4 taken from Stipulation ¶¶ 6-8, 10-12.

2 U.S.C. § 441a(f). *Cf. In re Federal Election Campaign Act Litigation,* 474 F.Supp. 1044, 1047 (D.D.C. 1979). CALPAC has *not* been charged with a "knowing and willful violation" which must be shown in order to impose FECA's double-penalty provision. 2 U.S.C. § 437g(a)(6)(C).

III

In addition to a declaration of the defendants' liability, the FEC seeks the imposition of civil penalties and the issuance of a permanent injunction. FECA authorizes the Court to impose a civil penalty "which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in [the] violation." 2 U.S.C. § 437g(a)(6)(B), formerly 2 U.S.C. § 437g(a)(5)(C) (1976). In this case, the civil penalty may not exceed $9,631.13 for the 1976 violation, $6,350.72 for the 1977 violation, and $5,000 for the 1978 violation.[9] Thus, the maximum penalty would be a total of $19,235.69. The FEC limited its request to a $5,000 penalty for each defendant because of the complex constitutional and statutory questions surrounding this litigation. In light of that factor, the Court finds that a $5,000 penalty upon each defendant is reasonable and appropriate.

The propriety of injunctive relief, which is authorized by the same statutory provision cited above, is governed by a three-part test. The Court is to consider whether (1) the defendants acted in good faith and with diligence to cure the violation, (2) the task faced by the defendants in complying with the statute was complex and whether the

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[9]These figures were computed by subtracting $5,000 from the figures listed on line 5 of table 2. The 1978 figure is set at $5,000 in the text because the excessive portion of the contribution was $3,233.84, which is less than $5,000.

statute was difficult to interpret, and (3) an order would have any effect in ensuring better compliance in the future. *FEC v. Committee for a Constitutional Presidency-McCarthy '76,* Fed. Elec. Campaign Financing Guide (CCH) ¶ 9074 at 50,632 (D.D.C. 1979). In this case, the FEC has not shown that the defendants did not act in good faith to attempt to cure the violation. Both parties acknowledge the complexity of the issues and the facial ambiguity of at least some of the statutory provisions in question. Finally, there is no indication that an injunction would be necessary in order to ensure future compliance with FECA's contribution limits. Thus, the Court concludes that injunctive relief is not warranted at this time.

This Opinion constitutes findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Accordingly, IT IS HEREBY ORDERED that:

1. Judgement shall be entered in favor of the Federal Election Commission and against the California Medical Association and the California Medical Political Action Committee on the Federal Election Commission's first claim for relief.

2. Each defendant shall pay a civil penalty of five thousand dollars ($5,000) to the Federal Election Commission.

The parties shall lodge a stipulated form of judgment by October 31, 1980.

Dated: October 21, 1980.

/s/ WILLIAM H. ORRICK

William H. Orrick
United States District Judge

Appendix G

United States District Court
for the District of Columbia

Common Cause, et al., Plaintiffs v. Harrison Schmitt, et al., Defendants Federal Election Commission, Intervenor	CA 80-1609 (Consolidated) Three-Judge Court
Federal Election Commission, Plaintiff v. Americans for Change, et al., Defendants	CA 80-1754 Three-Judge Court

[Filed Sept. 30, 1980]

Case heard before *Circuit Judges* TAMM and WILKEY, and *District Judge* PENN, Three-Judge District Court.

Opinion filed for the court by *Circuit Judge* WILKEY.

OPINION

WILKEY, Circuit Judge:

The Federal Election Commission ("FEC"), and Common Cause, a public interest organization, sued in two separate actions various groups of Ronald Reagan sup-

porters who plan to spend monies to promote his chances in the 1980 presidential election. Both plaintiffs alleged that the plain language of section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act")[1] prohibits the defendants' proposed expenditures which will exceed $1,000 to further the election of Ronald Reagan. As the Republican candidate for President, Mr. Reagan is entitled under the Fund Act to receive, and has already accepted almost $30 million in public campaign funding. Pursuant to 26 U.S.C. section 9011(b) this three-judge district court was convened with jurisdiction to "implement or construe" the Fund Act. The statute further directs the court to act as quickly as practicable. On 19 August 1980 we heard oral argument on the scope and constitutionality of section 9012(f). On 28 August 1980 the court issued two expedited Orders granting, *inter alia*, summary judgment for the defendants in the FEC action, and dismissing the Common Cause action. In this Opinion we develop our reasoning for the two Orders of 28 August.

I. STATUTORY PROHIBITION AGAINST EXPENDITURES BY POLITICAL COMMITTEES

A. *Background*

The defendants in both actions are various organizations, as well as a few of their organizers, who are broadly soliciting contributions from individuals who favor Ronald Reagan for president. These organizations plan to use the money they collect—they hope to raise and spend millions of dollars—to hire professional media and political consultants and purchase advertising, *etc.* They intend these

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[1] 26 U.S.C. § 9001 *et seq.* (1976)

expenditures to yield an effective program to promulgate their political views before the November election. The defendants organizations have registered with the FEC as "political committees."[2] The defendants' literature and solicitation materials detail their support for Ronald Reagan and outline their intention to spend the sums collected to realize their collective aspirations for the presidential election.

B. *Statutory Basis: Jurisdiction and Substantive Prohibition*

1. *Jurisdiction in a Three-Judge District Court*

The FEC is plainly authorized by section 9011(b)(1) of the Fund Act to seek a declaratory judgment "that section 9012(f) validly prohibits expenditures in excess of

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[2]A "political committee is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

26 U.S.C. § 9002(9(1976)

Under another statute, the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 433(a)(1976), any "political committee" that is not an authorized campaign committee must file a statement of organization with the FEC within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The definition of "political committee" within the FECA is roughly the same as the definition of that term in the Fund Act.

$1,000 such as defendants have indicated they intend to undertake."[3] The statute is set out in full in the margin.[4] The right of Common Cause to bring such an action, on the other hand, is equivocal. We will reserve all discussion of the Common Cause lawsuit until Parts IV and V below.[5]

The statute requires a three-judge district court to entertain actions to "implement or construe" the Fund Act. This action to test the scope and validity of section 9012(f) is within the jurisdiction of this court to "implement or construe" provisions of the Act.

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[3]Motion of FEC for Summary Judgment at 30.

[4]26 U.S.C. § 9011(b)(1976) provides:

§ 9011. Judicial review

(b) Suits to implement chapter—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [*sic*, quoted here as "construe"] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[5]Common Cause requested substantial discovery of defendants as well as injunctive relief, neither of which was integral to the FEC complaint. *See* Parts IV-V *infra*.

2. *Prohibition Against Expenditures by "Political Committees"*

The plain language of section 9012(f) proscribes categorically the defendants' planned expenditures. They, the defendant "political committees," plan "to incur expenditures" "in an aggregate amount exceeding $1,000" "to further the election" of presidential candidate Reagan. This program of expenditures is a criminal offense according to the statutory section which is entitled "Criminal penalties." In pertinent part it reads:

> § 9012. Criminal penalties
>
> (f) Unauthorized expenditures and contributions.—
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
>
> * * *
>
> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

We understand section 9012(f)(1) to prohibit *all* expenditures over $1,000 by political committees including *"in-*

dependent expenditures." An independent expenditure is an expense incurred by a political committee free of any coordination with the official and authorized campaign committees of the candidate. We reject the limiting construction of section 9012(f) offered by defendants Harrison H. Schmitt, Carl T. Curtis, and Americans For Change. They suggest that the provisions may be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate.[6] Though this "saving" construction would neatly preserve the statutory proscription from constitutional infirmity under *Buckley v. Valeo*[7] the language of the section will not support this rescue.

The section's plain terms apply broadly to *all* expenditures and this is in contrast with another section, section 9002(11) of the Fund Act, where Congress did adopt limiting language of this kind. If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses[8] rendering the proviso unnecessary.

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[6]*See* Memorandum of Points and Authorities in Support of Motion to Dismiss of Defendants Harrison H. Schmitt, Carl T. Curtis and Americans For Change at 10-13.

[7]424 U.S. 1, 46-47 & n. 53 (1976).

[8]*See* 26 U.S.C. § 9002(11) (1976).

Also, another election law statute, 2 U.S.C. section 441a (a)(1)(A), already prohibits individuals, groups, and committees from making contributions in excess of $1,000. A "contribution," however, is defined, in 2 U.S.C. section 441a (a)(7)(B)(i), to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate. . . ." Hence we can only read the expenditure prohibition in section 9012(f) to mean what it says: *all expenditures* over $1,000 by political committees which further a presidential candidate's election are illegal. We are compelled then to determine the constitutionality of this expenditure limitation consistent with the First Amendment analysis conceived in *Buckley v. Valeo.*[9]

II. FIRST AMENDMENT ANALYSIS UNDER *BUCKLEY v. VALEO*

In *Buckley v. Valeo*[10] the Supreme Court held that the campaign expenditure ceilings imposed by Congress in the Federal Election Campaign Act of 1971 ("FECA")[11] were unconstitutional. The Court reasoned that a statutory restriction on amounts which citizens, groups, or candidates could expend in a political campaign was an impermissible limitation of the freedoms of speech and association protected by the First Amendment. The watershed case controls the election law case before this court. Thus a discussion of *Buckley* is appropriate before beginning our own constitutional analysis of the severe expenditure ceiling imposed on political committees.

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[9]424 U.S. 1 (1976).

[10]*Id.* at 12-59.

[11]2 U.S.C. § 431 *et seq.* (1976)

A. *Campaign Expenditures Are Speech*

The Supreme Court made quite clear in *Buckley* that the power of Congress to regulate federal elections was well-established under the Constitution.[12] That power to regulate, however, is not unbounded; it must of course be exercised consistent with rights guaranteed by the Constitution.

Campaign activity is speech on the highest constitutional plane. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[13] Moreover, political expression in a campaign is associational activity also protected by the First Amendment. The Constitution guarantees the " 'freedom to associate with others for the common advancement of political beliefs and ideas', a freedom that encompasses '[t]he right to associate with the political party of one's choice.' "[14]

The Supreme Court noticed in *Buckley* the reality that public communication is expensive. Free speech is costly. Television, radio, newspapers, buttons—the Court has

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[12]*Buckley* v. *Valeo,* 424 U.S. at 13.

[13]*Id.* at 14 (quoting *Roth* v. *United States,* 354 U.S. 476, 484 (1957)).

[14]*Id.* at 15 (quoting *Kusper* v. *Pontikes,* 414 U.S. 51, 56, 57 (1973) (*quoted in Cousins* v. *Wigoda,* 419 U.S. 477, 487 (1975)).

> "The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo,* 424 U.S. at 15. The Court noted that the constitutional right of association was derived from the role of group association to advocate *effectively* public and private points of view. *Id.* (citing *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958)).

acknowledged that "these expensive modes of communication [are] indispensable instruments of effective political speech."[15] A restriction on the amount which can be spent on political communication is a practical limitation on the political issues which can be addressed or answered in a campaign. It also limits the range of participants in the political debate, and the size of the audience.

B. *Level of Judicial Scrutiny*

It was strenuously argued to the Supreme Court in *Buckley* that *expenditures* in a campaign entailed primarily "conduct" and not "speech." The Court rejected this contention emphatically,[16] stating that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment."[17] "[T]he governmental interests

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[15] *Id.* at 19.

[16] *Id.* at 16.

[17] *Id.* (citations omitted).

> Unlike [*United States* v. *O'Brien*], [391 U.S. 367 (1978) (draft-card burning case)] where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money [in a campaign] "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S. at 382. *Id.* at 17.

Obviously Congress *intends,* albeit neutrally, to regulate the speech-potential of money contributions and expenditures through the election laws it enacts. The giving and spending of money is alluring to the candidate because of the speech-potential it provides to him or her, while to Congress that particular speech-potential also

advanced in support of the Act [*i.e.*, FECA] involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interests groups who have money to spend and reducing the overall scope of federal election campaigns."[18] Following *Buckley,* then, it is plain that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court.

C. *Compelling Governmental Interest*

The Supreme Court considered three governmental interests adduced to support the contribution and expenditure ceilings: to prevent corruption, or, the appearance of corruption; to mute the voices of affluent groups and persons; and, to put a "brake" on the ballooning cost of election campaigns.[19] Only the first interest, to squelch corruption, was held constitutionally sufficient to support the FECA's $1,000 contribution limitation—a limitation on speech. The Court was crystal-clear in stating that Congress had no valid power to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections . . ."; because, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[20]

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represents the enticement that could be the wedge of corruption, tainting the candidate and the election process. Thus Congress's regulatory intention with respect to campaign contributions and expenditures necessarily involves the regulation of speech.

[18]*Id.* at 17.

[19]*Id.* at 25-26.

[20]*Id.* at 48-49.

In short, the Court has indicated the prevention of corruption is the singular compelling governmental interest justifying the limit on maximum contributions to candidates. Congress has constitutional authority, the Court held, to ensure that the marketplace of ideas in an election is not recast as a marketplace of "influence."

D. *Constitutional Distinction Between Contributions and Expenditures*

The Court *did not accept* that even the compelling anti-corruption governmental interest supported a limitation on *expenditures* in a campaign. The Court reasoned that limitations on *expenditures* were more restrictive of First Amendment rights than limitations on *contributions,* hence the congressional objective to protect the new contribution ceilings by closing the so-called loop-hole of "independent" expenditures was constitutionally insufficient.[21] Preventing corruption would justify the contribution ceilings but would not also justify expenditure ceilings that redress only tangentially the corruption problem (*i.e.*, by "protecting" contribution limits from circumvention), yet severely impinge on free speech rights.[22] Controlling contributions, the Court believed, would exorcise *quid pro quo* from the political scene.[23] Impeding the opportunity for venal politician/contributor relationships was a constitutionally valid means of accomplishing the governmental interest in fighting corruption. Contribution ceilings preserve electoral integrity without directly impinging on the rights of indi-

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[21] *Id.* at 44.

[22] *Id.* at 45.

[23] Id.

viduals.[24] On the other hand, "the independent advocacy restricted by the [expenditure] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[25] For, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[26]

The right of citizens and groups to make expenditures in a campaign poses, according to the Court, only the most attenuated danger of *quid pro quo*. Evidently, *spending* money can just not be equated with *giving* money as a source of possible corruption. The Court noted that the threat of corruption in political spending was mitigated to a large extent by coupling unlimited expenditures with a strict restriction on contributions (which the Court upheld). There was no evil in collecting small amounts from myriad individual contributors and then translating those funds into political communication spreading the candidate's message.[27] Thus the Court struck down FECA's section 608(e)(1) which limited independent expenditures, saying, "[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[28]

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[24] *Id.* at 58.

[25] *Id.* at 46.

[26] *Id.* at 47.

[27] *See id.* at 56 & n.64 (quoting from Judge Tamm's separate opinion, concurring in part and dissenting in part, *Buckley* v. *Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975)).

[28] *Id.* at 58-59 (emphasis added).

A final perspective on *Buckley's* requirement of unlimited expenditures[29] comes from the more recent explication of the election laws in the *Republican National Committee v. Federal Election Committee* trilogy.[30] These cases upheld public financing of presidential elections. Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions. The candidate's decision, however, cannot bind his or her supporters outside the official campaign. Public funding—and the election law after *Buckley*—leaves open to supporters a wide range of means to express their support and their politics. In fact, *Republican National Committee* would appear to mean that the restrictions associated with public funding (*e.g.*, no private contributions, expenditure ceilings, *etc.*) are permissible only because the rights of supporters are left untouched. "Most important", reflected the court, is that

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[29]Pivotal to the Court's analysis of electoral integrity *vis a vis* independent expenditures was the statutory provision that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id.* at 46. The Court recognized that it was one thing for Congress to restrict expenditures free from the candidate's control, but quite another for Congress (validly) to limit sham, "independent" expenditures, which being in the candidate's effective control amounted to nothing more than masked contributions and could be regulated as such.

[30]100 S.Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *and*, 616 F.2d 1 (2d Cir.) (*en banc*).

"uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley v. Valeo.*"[31]

III. SECTION 9012(f) LIMITATIONS ON EXPENDITURES BY POLITICAL COMMITTEES INHIBITS FIRST AMENDMENT FREEDOMS

The foregoing discussion of *Buckley* indicates the dubious constitutional quality of election law ceilings limiting amounts which may be independently expended in a campaign. The *Republican National Committee* cases still reserve a highly protected status for *independent expenditures* even since the advent of (conditional) public funding for presidential candidates (who accept the terms). Now we turn to our own constitutional analysis of section 9012(f)'s prohibition of independent expenditures by political committees in excess of $1,000. This analysis turns on two fundamental questions which will explore whether section 9012(f) is consistent with the First Amendment after *Buckley:* (1) Does the proposed spending by the defendant political committees constitute an "expenditure" question under *Buckley*?, and (2) Are political committees, under *Buckley,* entitled to the same First Amendment rights to make independent expenditures as individuals and "informal groups?" We answer both questions affirmatively and hold that section 9012(f) is facially unconstitutional.

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[31] *Republican National Committee* v. *Federal Election Committee,* 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court), aff'd summarily, 100 S.Ct. 1639 (1980) (citing *Buckley,* 424 U.S. at 39-51).

A. *Political Committee Prohibition Is an Expenditure Limitation and Thereby Limits Speech*

Under *Buckley* and the *Republican National Committee* cases the right of individuals and groups (outside of official campaigns) to make independent expenditures is a constitutional pillar of the election laws. Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding.[32] There is no constitutional reason that the organization of individual supporters of a candidate into groups called "political committees" should impugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship.

1. *This is Not a "Contribution" Case*

Buckley indicated clearly that expenditure limitations jeopardize First Amendment rights more severely than do limitations on contributions.[33] Consequently, *Buckley* held that the governmental interest in cleansing the electoral process of possible corruption was not enough to validate restrictions on expenditures. A "contribution" case, on the other hand, is entitled to less-exacting judicial scrutiny because "the transformation of contributions into political debate involves speech by someone other than the con-

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[32]*See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S. Ct. 1639 (1980).

[33]*See* Part II. D. *supra.*

tributor."[34] The case before this court is an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction.

The defendant political committees are simply "pooling agents" for many small voices wishing to make intelligible political statements. The money expended by the committees pays for political communications which speak the language of their members and contributors. It is the speech of the contributors which is defrayed by the contributions. Earlier, we noted that political speech is expensive nowadays. It requires a lot of money and a lot of sophistication to yield effective communication in the political arena. Political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message. A simple example explains the efficiency argument: One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however, they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication. Since it is beyond contention that individuals and "informal groups" may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groups of like-minded individuals.

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[34] *Buckley* v. *Valeo*, 424 U.S. at 21.

2. *Individuals Speak Through Political Committees*

The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. The contributors do have power over the speech disseminated by the political committees. Political speech like this is possible in the first instance only because the contributors contribute to one particular committee or another. Contributors associate in a particular political committee because that committee will express their own thoughts, which benefit thereby from amplitude in numbers and professionalism. If a committee disappoints its membership, contributions will dry up.

To require that contributors to political committees literally draft their own television and other public messages is naive. These contributors express themselves through political committees—their First Amendment rights are not merely coextensive with their actual participation in drafting specific language. The language drafted by the steering groups of the political committees reflects the political speech common to all of the member-contributors. That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age. One thousand individuals have just as much right to join together to do this as one man or woman to do it alone. It emasculates

the guaranteed right of association to disallow political committees from organizing and focusing the views of their adherents.[35] Thus the expenditures undertaken by the political committees represent an efficient exercise of First Amendment rights of associated individuals. This exercise warrants the highest protection under *Buckley* and *Republican National Committee.*

3. *Speech Emanating from Political Committees Is Different from a Candidate's Speech*

A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the nonpublicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates are loosely tethered, not bound, to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interests based on a broader constituency. (This

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[35] *See* Part III. B. 2 *infra.*

explains the apprehension with which many candidates' organizations look on the activities of uncoordinated and uncontrollable independent committees, but this does not and cannot limit the right of these independent committees to make their contribution to the robust political debate in any way they and their associates choose.)

The above comparison highlights once again the factual reality, as well as constitutional reality following *Buckley* and *Republican National Committee,* that the rights of candidates and their supporters are distinct. In *Buckley,* the Court realized that candidates could be ambivalent toward the independent political forays of their supporters. The Court noted that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[36] Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, they can express viewpoints which seek to influence or prod the candidate and the public. That individuals, through their political committees, hope for a candidate's election in no way means that their own speech is interchangeable with the candidate's. The Constitution entitles even mainstream individuals favoring mainstream candidates to communicate their separate, if sympathetic, views.

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[36] *Buckley* v. *Valeo,* 424 U.S. at 47.

4. *Political Committees Cannot Wield the* Quid Pro Quo: *The Compelling Interest in Eliminating Corruption is Insufficient to Justify Section 9012(f)*

As elaborated in Part II above, the *Buckley* Court sustained FECA's contribution, though not expenditure, limits on the basis of the compelling governmental interest in protecting elections from the taint of corruption. The Court saw in contributions to candidates the real possibility of corrupting *quid pro quos.* Independent expenditures, the Court felt, could not pose the same *quid pro quo* problem.

Similarly, the anticorruption interest cannot support the prohibition against *independent* expenditures by political committees. Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are *independent.* A *coordinated,* non-independent expenditure by a committee might harbor a *quid pro quo,* but no more so than an individual's expenditures might.[37] Coordinated expenditures, by individuals or committees, are treated like contributions;[38] such contributions to a publicly funded candidate are of course illegal, but are inapposite to the constitutional issue here under consideration.

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[37]In fact, the large-scale operation of a political committee, requiring registration with the FEC, would be less capable of keeping a *quid pro quo* secret than could a wealthy individual operating without the bright sunshine of public scrutiny.

[38]*See* notes 7-9, 29 & accompanying text *supra.*

It is difficult, then, to imagine how the thousands of "small voices" associated together in a political committee could compromise a candidate for President. The political committees are venting the political ideas and commitments of their members, not of the candidate. The candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them. It is individuals themselves, acting in association, who are addressing political issues through independent expenditures. This public comment may persuade, and thereby influence decision-makers, but it is protected by the First Amendment.[39]

A further check does now exist, however, on the power of political committees to finance the views of their members: contributions to committees are restricted in amount by 2 U.S.C. section 441a(a)(C). An individual may give only up to $5,000 to a political committee. This particular contribution limitation was not addressed directly in *Buckley,* but might be constitutionally permissible according to the *Buckley* rationale, which upheld other such limits.[40] What all of this clearly indicates is that while

[39]*See Let's Help Florida* v. *McCrary,* 621 F.2d 195 (5th Cir. 1980).

[40]Contribution limits to political committees have been upheld in two recent cases. *See California Medical Association* v. *FEC,* No. 79-4426, slip op. (9th Cir. 23 May 1980); *Mott* v. *FEC,* No. 79-3375 (D.D.C. 30 June 1980). Congress could, perhaps, if these authorities are upheld, shrink reasonable limits on contributions as it might deem necessary to control further possibilities for corruption in the electoral process. We have no occasion here to express any view on the constitutionality of specific limitations on contributions to political committees. *But cf. California Medical Association* v. *FEC,* No. 79-4426, slip op. at 25-26 (9th Cir. 23 May 1980) (Wallace, J., concurring and dissenting):

political committees may have the power to express sympathy and agreement with candidates, neither they nor individual members have the power to control the candidates they favor.

B. *Political Committees Have First Amendment Rights Commensurate With Individuals' Rights*

In the preceding section we demonstrated that the prohibition of section 9012(f) raises an *expenditure* question under *Buckley,* thereby implicating highly protected free speech rights. We also showed how political committees simply pool funds and channel the joint speech of their members. We now turn to consider directly the closely related question: whether political committees, as multi-person organizations, have First Amendment rights so inferior to those of individuals that they fall out from the protective aegis of *Buckley*?

1. Buckley *Comprehends First Amendment Rights for Groups*

It is absolutely plain that free speech rights protected under *Buckley* extend beyond individuals. The Court there overturned "substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression. . . ."[41]

Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political market place with other more affluent 'persons' capable of huge personal expenditures.

[41]424 U.S. at 58-59 (emphasis added). The Court also wrote: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups,* and candidates." *Id.* at 39 (emphasis added).

Furthermore, the Supreme Court has also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, *association,* union or individual."[42] As a "political committee" is defined in 26 U.S.C. section 9012(9) as "any committee, association or organization" which receives contributions or makes expenditures for the purpose of influencing a candidate's election, it should fall under the same general protection reserved for groups and associations wishing to communicate their interests to the public. The fact of receipt of contributions (to finance expenditures) does not distinguish political committees from any other association which takes an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may, it has been decided, lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications, *e.g.*, television, magazine, newspaper, billboard advertisements, *etc.*, which the committee would undertake. Individuals—wealthy or otherwise—groups and associations, and political committees all engage in the same speech activities. In all cases the speech is meant to express active support for or opposition to a particular candidacy; *i.e.*, to express affiliation with and approval for the ideas of that candidate, or the reverse. This active support or opposition is buttressed by the "profound na-

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[42] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

tional commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[43]

2. *Freedom of Association Requires That Individuals Be Allowed to Join in Political Committees*

If section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force. This right of association is crucial under the Constitution and recognized in *Buckley*. We believe what the *Buckley* Court said about FECA's contribution and expenditure limits is dispositive here on the right of individuals to join political committees and thereby amplify their ability to speak publicly on matters of political concern. The Court said:

> The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, *but leave the contributor free to become a member of any political association and* to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote

[43] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

We note that the election law exempts press organizations, 26 U.S.C. § 9012(f)(2)(A), and tax-exempt "section 501(c)" organizations, *id.* § 9012(f)(2)(B), from the limitations applicable to political committees. This discrimination against political committees along with the discrimination in favor of wealthy individuals is without constitutional foundation.

> effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP v. Alabama,* 357 U.S. at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion). See *Cousins v. Wigoda,* 419 U.S., at 487-488; *NAACP v. Button,* 371 U.S. 415, 431 (1963).[44]

Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that. This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. An independent association dedicated to effective political expression which was not in essence a "political committee" would be either an exempted organization,[45] or terribly quaint. The Constitution protects potent political voices along with the more effete ones; the First

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[44] *Buckley* v. *Valeo,* 424 U.S. at 22-23 (emphasis added).

[45] *See* note 43 *supra.*

Amendment ensures both that persons may speak, and that they may speak together.

C. *Conclusion—Section 9012(f) Violates the First Amendment*

Given our holdings that section 9012(f) is an expenditure restriction, and is, therefore, a powerful inhibition on political speech, we must strike down that section as it fails to survive the strict scrutiny required by the First Amendment. The compelling governmental interest to fight electoral corruption is insufficient, here as in *Buckley,* to justify what amounts to a direct limitation on political speech. Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate.

IV. COMMON CAUSE SUIT DISMISSED AS MOOT

In Count I of its lawsuit Common Cause sued for injunctive and declaratory relief to the effect that section 9012(f) applied to the defendant political committees and prohibited their proposed expenditures. This involves the same issue as in the action brought by the FEC, herein resolved against the FEC. Consequently, as in our 28 August 1980 Order, we dismiss Count I of Common Cause's action as mooted pursuant to our decision in the FEC action. We express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit before this court.

V. COMMON CAUSE MAY NOT SUE *TO ENFORCE* THE ELECTION LAWS

Count II of the Common Cause Complaint does not implicate section 9012(f)'s prohibitions against independent expenditures. Rather, the theory of Count II is "that the defendant committees are not in fact independent of Ronald Reagan and his authorized committees. The violations of the Fund Act that Count II alleges are violations that result from, and are premised upon, coordination and concerted action between defendant committees and the Reagan campaign."[46] We understand Count II to be an impermissible attempt by Common Cause, a private plaintiff, to enforce the Fund Act. We are without subject-matter jurisdiction under section 9011(b) to hear this claim.[47] The FEC is charged by statute with exclusive enforcement jurisdiction of the election laws, and moreover, the alleged illegal coordination would violate Fund Act provisions only with respect to *candidates,* not the defendant political committees; therefore, we hold also that Count II fails to state a claim upon which relief can be granted.

A. *No Subject-Matter Jurisdiction to Hear a Coordination Claim*

Section 9011(b) of the Fund Act grants jurisdiction to three-judge district courts of the United States to entertain

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[46]Plaintiffs' Opening Brief on the Merits at 50.

[47]Whether a single-judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court. Our holding dismissing Count II does not require explicit consideration of the Article III "case or controversy" requirement. As we find ourselves without subject-matter jurisdiction we leave open the question of Common Causes's standing to bring Count II of its complaint.

actions "to implement or construe" provisions of the Fund Act whether or not the plaintiff has exhausted administrative or other remedies.[48]

Count II, though, raises complicated questions of fact and difficult questions of election law policy which are without the scope of "implement or construe." It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration,[49] to supervise extensive discovery and receive detailed factual evidence. This fact-finding, of course, is prerequisite to—and pertains only to—a determination of *compliance* with the election laws. A compliance issue is not one properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a nonexpert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

Congress ordered expedition in judicial review under section 9011(b) because elections come up fast and candidates, whoever they turn out to be, and others, need to know whether and how the election laws apply, and how much they provide.[50] So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubtful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates.

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[48]26 U.S.C. § 9011(b)(1) & (2) (1976).

[49]26 U.S.C. § 9011(b)(2) (1976).

[50]*See* S. CONF. REP. NO. 92-533, 92d Cong., 1st Sess. 53-54 (1971); 117 CONG. REC. H. 12, 119 (9 Dec. 1971).

Three-judge district courts are convened typically in order to judge a statute's constitutionality on its face, or to clarify a statute's meaning and application pursuant to standard judicial statutory construction. Three-judge district courts were used in *Buckley* and *Republican National Committee* as a forum for constitutional challenges to the Fund Act.[51] In short, we view the section 9011(b) jurisdiction of this court narrowly. The narrow view is inherent in "implement or construe," by which we understand Congress to have limited the competence of this court to questions of fundamental statutory interpretation and to pressing pre-election questions of uncertainty regarding funds allocable to candidates.[52] Questions of Fund Act violations that require elaborate investigation of unique factual situations are not proper subjects for this court.

B. *FEC Has Exclusive Enforcement Jurisdiction*

Congress has legislated in no uncertain terms with respect to FEC dominion over the election law. Section 437c(b)(1) of FECA reads:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of Title 26 [*i.e.*,

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[51]*See also Jones v. Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (substantial constitutional question prerequisite to convening of three-judge district court). All precedents are in accord supporting the proposition that three-judge district courts are extraordinary legal forums which are convened only to hear cases of special public interest.

[52]The time-sensitivity of a candidate's—and others'—need to know about available funds explains § 9011(b)'s provision of jurisdiction notwithstanding any exhaustion of administrative remedies.

> the Fund Act]. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.[53]

Since we view Count II as clearly an enforcement action, an action to ensure compliance with various provisions of the Fund Act, we must hold that FECA's section 437c(b)(1) precludes any consideration of alleged coordination of expenditures as pressed by Common Cause before this court.

The FEC itself adjudges Count II of the Common Cause complaint as an action to enforce the election laws.[54] The FEC which was allowed to intervene in the Common Cause action moved to dismiss Common Cause's complaint for lack of subject-matter jurisdiction.

The FEC's position on its enforcement jurisdiction has recently been vindicated by a panel of the Court of Appeals for this circuit.[55] That court held that violations

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[53]2 U.S.C. § 437c(b)(1), as amended by Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1355 (1979).

[54]FEC Motion to Dismiss at 11 & n.8. The FEC contended in footnote 8 that its "suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act," rather, it "seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. § 9012(f) pursuant to 26 U.S.C. § 9011(b)." In text the FEC wrote that Common Cause was simply "bring-[ing] an enforcement action in the guise of a suit to implement or construe the statute."

[55]*Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80-1841 & 80-1842, slip op. (D.C. Cir. 12 Sept. 1980).

of the election laws[56] must first be brought before the FEC as within that agency's exclusive jurisdiction. The *Carter-Mondale* holding that the FEC has exclusive jurisdiction with respect to alleged campaign violations and noncompliance controls here.[57]

C. *Alleged Violations in Count II Do Not Apply to Political Committees*

Common Cause alleges in Count II that the defendant committees' proposed expenditures will violate sections 9003(b)(1), 9003(b)(2), 9012(a)(1), and 9012(b)(1) of the Fund Act. These provisions apply to presidential candidates who receive federal funding and must, therefore, limit their own expenditures and forgo private contributions.[58] Each of these sections can be violated only by *the candidate* receiving federal funds. Thus Count II does not state a claim alleging a violation of the Fund Act

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[56]The alleged violations in *Carter-Mondale* involved the same issues of coordination between political committees and the official Reagan campaign that are the substance of Common Cause's Count II. *See id.* at 8.

[57]"Exclusive jurisdiction," held the court, was especially powerful in the election law context. The law "provides for FEC enforcement through both informal consent proceedings and formal proceedings." *Id.* at 11. An FEC investigation may completely absolve the challenged conduct, or may result in a partial vindication resolved by a consent decree. The intrusion of massive discovery requests by a private party, like Common Cause, would plainly upset the delicate balance in the structure of campaign regulation. Common Cause would unsettle the coherent administration of election law policy and practice if allowed to go forward with Count II of its complaint.

[58]Candidates may not restrict the individual rights of their supporters as a result of the choice to accept public funding. *See* notes 30-32 & accompanying text *supra*.

by the defendant political committees. This also confirms the impropriety of permitting a private party to enforce the election laws at its own discretion. For these reasons we dismiss Count II also for failure to state a claim upon which relief can be granted.

CONCLUSION

Consistent with our Orders of 28 August 1980, we deny the FEC's motion for summary judgment and grant summary judgment for the defendant political committees and individuals on the grounds that section 9012(f) violates the Constitution. We dismiss Count I of the complaint brought by Common Cause as moot; Count II is dismissed for lack of subject-matter jurisdiction and for failure to state a claim.

So ordered.

/s/ EDWARD ALLEN TAMM

Edward A. Tamm
Circuit Judge

/s/ MALCOLM RICHARD WILKEY

Malcolm Richard Wilkey
Circuit Judge

/s/ JOHN GARRETT PENN

John Garrett Penn
Circuit Judge

September 30, 1980